Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77 1134

UNITED STATES OF AMERICA,

Appellee,

v.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

An Appeal from the United States District Court for the District of Montana Helena Division

APPENDIX TO JURISDICTIONAL STATEMENT

ROBERT W. CORCORAN, Chief Tax Counsel,
Department of Revenue, State of Montana.
Mitchell Building
Helena, Montana 59601

Of Counsel:

TERRY B. COSGROVE, Special
Assistant Attorney General,
State of Montana
P.O. Box 1144
Helena, Montana 59601

ROBERT A. POORE, Special
Assistant Attorney General,
State of Montana
Suite 400, Silver Bow Block
Butte, Montana 59701

APPENDIX INDEX

Pages

Lower Court Judgment and Injunction 1-4

Decision, Lower Court (Majority) 5-19

a) Dissent below 20-35

Notice of Appeal 36

Montana's Contractors' Gross Receipts Tax (The Act) 38-48

Stipulation on Abstention (Continuance)
a) 1971 49
b) Order on Abstention ('71) 50
c) 1973 56
d) Order ('73) 58

Notice of Entry of Kiewit # 1 Decision 52

State's Motion For Summary Judgment
a) 1973 60
b) Motion to Amend 63
c) Order Denying 65-76

Stipulation that Regulatory Provisions of Act are Inapplicable 77
a) Partial Judgment to that Effect 78

Pre Trial Order 80-104

Kiewit # 1 105-123

Kiewit # 2 124-130

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF America,

Plaintiff,

v.

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

CIVIL ACTION NO. 1989
FINAL DECLARATORY JUDGMENT
AND DECREE OF PERMANENT
INJUNCTIVE RELIEF

Filed and Entered Oct. 18, 1977

Before: KILKENNY, Circuit Judge, and EAST and SMITH, District Judges*

EAST, Senior District Judge, and SMITH, Chief Judge, with KILKENNY, Senior Circuit Judge, dissenting and specifically joining:

Based upon the decision of the majority of the three-judge District Court entered herein on August 19, 1977, it is

---

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of April 28, 1971, of the Honorable James R. Br[illegible]g, U.S. Circuit Judge for the Ninth Circuit, William G. East, [illegible]or U.S. District Judge for

ADJUDGED AND DECLARED that the provisions of the State of Montana's public contractors' licensing and Gross Receipts Tax Act, Chapter 35, Title 84, Revised Code of Montana, as amended, (the Act) and the rules and regulations promulgated thereunder, insofar as they apply to the United States of America, its contractors, subcontractors and those with whom it deals, are in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and are, therefore, unconstitutional and void as to said United States of America, its contractors, subcontractors and those with whom it deals, and in enforcement thereof.

DECREED that the State of Montana, its officers, agents, employees, attorneys and those persons in active concert or participation with it or under its authority, are hereby permanently enjoined from enforcing the Act and the rules and regulations promulgated thereunder as against the United States, and its contractors, subcontractors and those with whom it deals, and from imposing, assessing or collecting any license fees or taxes provided for in the Act against the United States of America, its contractors, subcontractors and those with whom it deals.

Further, it is

ORDERED that the issue of the United States of America's claim for recovery of the overplus of license

---

the District of Oregon, and Russell E. Smith, Chief Judge for the District of Montana. Thereafter pursuant to the designation of the Honorable James R. Browning, Chief Judge for the Ninth Circuit under date of July 13, 1976, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable John F. Kilkenny, Senior U.S. Circuit Judge for the Ninth Circuit, in lieu of the Honorable James R. Browning, and the redesignation and appointment of the Honorable William G. East and the Honorable Russell E. Smith.

fee and gross receipts tax paid to the State of Montana pursuant to the terms of the Act be remanded to the single judge District Court for determination, and the present injunctive restraint of general fund disposition by the State of Montana of such overplus is to remain in full force and effect until further order of the single judge District Court.

Finally, it is

ORDERED that except for the continuation of the above-mentioned injunctive restraint of general fund disposition, execution of the foregoing declaratory judgment and decree of injunctive relief be stayed for a period of 60 days after the entry of this judgment and decree, or if an appeal is timely filed in the United States Supreme Court on or before that date, until the matter is finally resolved by that Court.

The Clerk's mailing of a copy of this declaratory judgment and decree of permanent injunctive relief through regular United States postal service mailing to the defendants' attorneys of record shall constitute good notice to all of the State of Montana's officers and agents engaged in the enforcement of the Act.

WILLIAM G. EAST
SENIOR U.S. DISTRICT JUDGE

RUSSELL E. SMITH
UNITED STATES DISTRICT JUDGE

KILKENNY, Senior Circuit Judge, specifically joining:

I join in the foregoing Final Declaratory Judgment and Decree only to the extent of granting the stay of execution pending a timely appeal to and ultimate disposition of the cause by the United States Supreme Court.

JOHN F. KILKENNY
SENIOR U.S. CIRCUIT JUDGE

Dated this 17 day of October, 1977.

DECISION

Before: KILKENNY, Circuit Judge, and EAST and SMITH, District Judges*

EAST, Senior District Judge:

The Action:

The United States of America, by and through an appropriate delegate of the Department of the Army, (Government) filed this action in April, 1971 against the State of Montana and the above named officials of that state (State). During the proceedings, the three-judge District composed of Judges Browning, East and Smith postponed the proceedings during the pendency of a state court action culminating in the decision of the Supreme Court of the State in *Peter Kiewit Sons' Co. v. State Board of Equalization,* 161 Mont. 140, 505 P. 2d 102 (1973), [*Kiewit*].

---

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of April 28, 1971, of the Honorable James R. Browning, U.S. Circuit Judge for the Ninth Circuit, William G. East, Senior U.S. District Judge for the District of Oregon, and Russell E. Smith, Chief Judge for the District of Montana. Thereafter pursuant to the designation of the Honorable James R. Browning, Chief Judge for the Ninth Circuit under date of July 13, 1976, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable John F. Kilkenny, Senior U.S. Circuit Judge for the Ninth Circuit, in lieu of the Honorable James R. Browning, and the redesignation and appointment of the Honorable William G. East and the Honorable Russell E. Smith.

A final pretrial order was filed by the parties wherein the Government challenges the validity of the State's public contractors' licensing and Gross Receipts Tax (G.R. Tax) Act, Chapter 35, Title 84, Revised Code of Montana 1947, as amended, (the Act)[1] and regulations promulgated thereunder under Article VI, Clause 2, (Supremacy Clause) and the Fourteenth Amendment (Equal Protection Clause) to the United States Constitution, and seeks:

(a) Declaratory and injunctive relief against the enforcement of the Act against it, its contractors, subcontractors, and others with whom it deals (Contractors); and

(b) A refund of unlawful taxes paid by the Government through its Contractors.

Following oral argument before this three-judge District Court, the matter was submitted upon the merits based upon the evidentiary record made before the Honorable Russell E. Smith and the records and files herein.

Jurisdiction:

We note jurisdiction under 28 U.S.C. §§ 1345 and 2201.

[1] For a concise history and statement of the purposes of the Act, see *Kiewit*, 505 P. 2d at 104-06. In short, the Supreme Court of Montana labels the Act as a legislative "revenue enforcing measure designed to operate hand in hand with (the State's) long-standing personal property tax and income tax, to ensure more effective tax collection and reduce tax avoidance."

The Act:

The Act provides:

(a) The definition of a public contractor is anyone who proposes and does perform work for the government, state, its county or municipal governments, and school districts, and is required to meet standards or grounds to determine fitness and responsibility in order to: (1) submit bids or proposals, (2) enter into contracts with the government, and (3) perform or continue his contractual obligations with the government, and is subject to suspension of the contractor's license upon stated conditions.
(R.C.M. 1947 § 84-3501 (b)).[2]

(b) It is unlawful for a public contractor to act in his capacity within the state without having a public contractor's license[3] and paying the G.R. Tax of one percentum of the value of the contractor's prime contract.
(R.C.M. 1947 §§ 84-3505 (5) and 84-3516.

(c) Methods for a public contractor to obtain a refund from and to the extent of the G.R. Tax, the amount of ad valorem personal property taxes ultimately assessed and paid to the appropriate local taxing authorities of the state, and

[2] It was held by the Supreme Court of Montana in *Kiewit* that the regulatory provisions of the Act do not apply to the United States, and the parties have stipulated that the regulatory provisions are not in issue here.

[3] The Act provides for fixed fees for A, B, and C licenses ranging in cost from $200 for an A license to $10 for a C license. The holders of B and C licenses are limited as to the value of the public contract which they may undertake. R.C.M. 1947 § 84-3505 (1) to (4). No issue arises as to those fees.

income and corporate income taxes ultimately determined to be due and paid to the state. (R.C.M. 1947 § 84.3514).

(d) For a preferred classification of private contractors who perform construction contracts for private persons, partnerships, joint ventures, private corporations (including those listed on the New York and American Stock Exchanges) or other non-governmental groups (private contracts) through an exemption to obtain a public contractor's license or pay the G.R. Tax.

Contentions of the Parties:

The Government contends that:

1. The licensing and G.R. Tax provisions of the Act and regulations thereunder are erroneous, invalid, and without legal force or effect because both the language and the operation of the Act violate the Constitution and laws of the United States in that they:

(a) Illegally discriminate against the Government, and its agencies and instrumentalities, and those with whom the Government does business.

(b) Illegally force the Government to pay more for its construction than does a private person, business, or corporation.

(c) Illegally discriminate against those with whom the Government does business.

(d) Illegally provide a system of refunds and credits that discriminate against an out-of-state contractor in favor of a Montana contractor and place a heavier tax burden on such out-of-state contractor.

(e) (The system of refunds and credits) illegally interferes with the Government's free choice to choose its contractors and frustrates the policy of

choosing the lowest bidder (in violation of federal procurement law).

2. The G.R. Tax was intended by the State's legislature as a "wash-out" revenue-enforcing measure and, accordingly, each year after all refunds and credits are taken by a Contractor or at the termination of each contract, the State must refund any excess G.R. Tax collected under the Act. Hence, the Government is entitled to a refund of taxes and license fees, with interest, equal to all such amounts or sums as have been paid to the State by the Government or its Contractors under the Act in excess of all refunds and credits taken.

The State contends that:

1. The G.R.Tax, which has worked out by virtue of credits and refunds to be actually a tax of one-half of one percent, is not a direct tax upon the Government so any economic impact upon the Government therefrom is indirect and not substantial.

2. The G.R. Tax is imposed equally and identically upon all public contractors, such that the State, and its subdivisions, are treated exactly the same as the Government.

3. The Act in no sense (either through refunds and credits or otherwise) discriminates against in-state and out-of-state Contractors.

4. The Government, as acknowledged in the pretrial order (item 12-(g), page 7), was the real party in interest in *Kiewit*. Therefore, under the doctrine of *England v. Medical Examiners,* 375 U.S. 411 (1964), (*England*) and *Drummond v. United States,* 324 U.S. 316 (1945), (*Drummond*), the Government elected to litigate its challenges to the constitutionality of the Act fully in the State Courts of Montana in *Kiewit* and is barred from relitigating the same again.

5. Further, the Government is collaterally

estopped from relitigating the following issues which it caused to be raised and decided:

(a) The reasonableness and validity of the classification for the tax purposes between public contracts and private contracts;

(b) The inapplicability of the Act as to the Government's selection or control of its Contractors; and

(c) That the tax is not directly on the Government and that any indirect economic impact is not substantial within the concepts of *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

Facts:

We find from the pretrial order agreed facts and evidence of record the following:

1. The Government, prior to and since enactment of the Act, has and will continue to contract with Contractors to perform construction work within the State to erect, build, excavate, alter or repair buildings, structures, installations of facilities for itself, its agencies and instrumentalities, including its Department of the Army.

2. Contractors performing construction contracts in the State are subject to the following three taxes:

(a) Personal property taxes payable to appropriate counties.

(b) Corporation License taxes, or income taxes based on net income, payable to the State.

(c) One percent G.R. Tax applicable to contract proceeds under construction contracts awarded by the Government.

3. Private contractors performing construction contracts in the State for private parties; *i. e.*, for parties

other than the Government, the State or political subdivisions thereof; are subject to the following two State taxes:

(a) Personal property taxes payable to counties in the State.

(b) Corporation license taxes, or income taxes, based on net income, payable to the State.

4. Prior to 1971, the Government contractually required its Contractors within the State not to take advantage of the refund provisions and credits provided for in the Act. Such a requirement was contained in the contracts involved in *Kiewit*. However, since 1971 the Government's contracts, as those involved here, required the Contractors to take advantage of all refunds and credits provided for in the Act and to reimburse the Government in the amount of them. The inescapable effect of the G.R. Tax is to increase the cost to the Contractors for doing business with the Government within the State. Some Contractors add the tax as a line item in their bids. It is inevitable that the increased cost will be passed on to the Government. The State's tax records show that after deducting all credits allowable on account of the payment by Contractors for ultimately assessed personal property and income taxes and corporate license fees, the State retains in its general fund approximately one-half of the G.R. Tax. This overplus or non-washout is an average figure because the tax credits which may be taken vary between Contractors. One Contractor may use more valuable personal property than another and one Contractor may be liable for either state corporate license fees or income taxes while another is not. As the credits which may be taken vary, the amounts of the Contractors' G.R. Tax actually retained by the State also vary. For example, an average Contractor performing a $5,000,000 contract for the

Government would, after credits, pay an overplus of G.R. Tax of slightly less than one-half of one percent, or $25,000. That amount constitutes general revenue to the State[4], a substantial part of which amount has been paid by the Government.

5. Subordinate public entities of the State experience the same adverse tax effect under their public contracts; however, the State does not because of its retention as general revenue of approximately one-half of the G.R. Tax paid.

6. The net amount of the G.R. Tax, after allowing all tax credits, paid by in-state based public contractors and retained in the general fund of the State is .44 of the G.R. Tax, and the net amount of the G.R. Tax paid by out-of-state public contractors and retained in the general fund of the State is .46 thereof.

Discussion and Conclusions:

State's Contention 5:

We meet a threshold disposition of the State's contention 5 raising the issue of a foreclosure of the Government's contentions under the doctrine of res judicata and judicial estoppel in view of the decision in *Kiewit*.

This issue was first raised herein immediately following the decision in *Kiewit* through the State's motion for a summary judgment under the rationale of *England* and *Drummond*. The motion was denied under the reasoning of this Court's decision entered on the 20th day of November, 1974. That decision reserved for later

[4] Since the Act has been in effect, it has produced up to July, 1975, general revenue to the State from Government contracts in the amount of $5,658,437.29, all in the face of legislative and judicial disavowal of intent to do so.

decision as to whether the holdings in *Kiewit* were dispositive of any of the ultimate pretrial order Government issues of unequal treatment. We will later herein meet that challenge. The decision also concluded that Government's asserted issue that the Act's provisions as applied to it violated the Supremacy Clause "remain(s) viable and uffettered by any holding in *Kiewit*."

We now reach that same conclusion.

Government's Contention 1 [a] and [c]:

We deem these two contentions to be one and the same.

It is manifest from the above findings of fact that as between the State and the Government, the imposition of the G.R. Tax upon Contractors discriminates against the Government and in favor of the State. Although a public contractor for the State might add the G.R. Tax as a line item in his bid and thus increase the cost of construction, the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. As indicated, that averages slightly less than 50 percent of the G.R. Tax. Contra, the Government is required to pay through increased bids by the imposition of the G.R. Tax and gets no return of the overplus of approximately 50 percent.[5]

Homestake-Sapin Partners V. United States, 375 F. 2d 507, at 512 (10th Cir. 1967), teaches:

[5] The Supreme Court of Montana in *Peter Kiewit Sons' Co. v. Department of Revenue,* 166 Mont. 260, 531 P. 2d 1327, at 1328 (1975), suggests that a Contractor "would be entitled to a refund or some other administrative remedy" for the overplus of the G.R. Tax retained by the State. However, no statutory or administrative procedure for such relief has been presently called to our attention.

"Whether a tax discriminatory against the United States is unconstitutional under the Fourteenth Amendment, the supremacy clause, or both, is a question the Supreme Court has not had occasion to answer. See discussion in *Comptroller of Treasury, Retail Sales Tax Div. v Pittsburgh-Des Moines Steel Co.*, 231 Md. 132, 189 A. 2d 107. Chief Justice Warren in *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 385, 80 S. CT. 474, 480, 4 L.ED. 2d 384, involving discriminatory taxes levied against lessees of government property, intimates that unconstitutionality in discrimination cases stems from the supremacy clause when he says, '...we have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved....Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself.'"

Compare Esso Standard Oil Co. v. Evans, 345 U.S. 495, 500 (1953). *See also United States v. City of Detroit*, 355 U.S. 466, 473 (1958); and *Alabama v King and Boozer*, 314 U.S. 1, 8 (1941).

We conclude and declare that the imposition of the G.R.Tax under the Act upon the Contractors subjects the Government to discrimination in favor of the State, all in violation of the Supremacy Clause. We further conclude that the Government is entitled to permanent injunctive restraint of future imposition of the G.R. Tax upon its Contractors in order to alleviate the discriminatory effect of the Act as applied to it.

Government's Contention 1 [b]:

In view of our holding that the Act violates the Supremacy Clause, we find it unnecessary to pass upon the Equal Protection Clause issues or upon the questions of collateral estoppel arising as to them.

However, nothing in the issues raised presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in *Kiewit*, the Government's current issue of the discriminatory effect upon it as an owner-builder by the imposition of the G.R. Tax upon its Contractors in violation of the Supremacy Clause. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948).

The decision in *Kiewit* finds a reasonable classification of public contractors, vis-a-vis, private contractors, for different tax purpose[6] treatment under the Act in a recital of some four factors, namely:

(1) A public work is intended for the use of the public, and if the work is inadequate in some particular way, this could expose and would expose some part of the public at large to danger, inconvenience, or injustice. That, of course, would not always be true in the case of a private contractor.

(2) Public contractors must be experienced; they must establish their qualifications to the state or federal government. However, private property owners could engage a licensed or unli-

[6] As heretofore pointed out, the Act is not revenue raising or taxing legislation, but on the contrary it is a measure to enforce other revenue and taxing laws. The evidence is conclusive that when the mission of the Act has been accomplished, as in this case, the State has received and kept in its general fund approximately one-half of the G.R. Tax paid by Contractors.

censed contractor or an experienced or inexperienced one.

(3) Public contractors invariably must provide a bond. Private works require bonds only at the election of the owner.

(4) Public works normally would involve elaborate, professionally drawn plans and specifications. They would also include mandatory supervison or inspection. Private works would have such inspection and/or supervision at the option of the owner.

It must be assumed for validity of such rationalization that those factors or reasons are subjects of and enforceable under state law; otherwise they are mere suppositions. Yet by reason of State's judicial decree and administrative action, none of the Act's requirements for the fitness, financial responsibility or supervision applies to Contractors.

It is manifest to us that as between Contractors and large structure private contractors,[7] there is no reasonable or rational factual basis for the demonstrated unequal treatment under the Act.

---

[7] It is common knowledge that throughout the United States, the Government contracts with private owner-builder parties for the construction and leasing of huge structures for governmental use.

There is relevant and substantial evidence in the record that there are no significant differences between a contractor's bid on an identical private project, vis-a-vis, a project to be performed for the Government; *i.e.*, the private construction of large band buildings and the Big Sky Ranch project or the Government's construction of a post office or courthouse building. The same type of construction-problems can be encountered in a private contract as in a public one, and the only essential difference between a federal construction project and an identical construction project performed for a private person, business or corporation is that the ultimate cost is approximately one percent greater to the Government.

"The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." *United States v. County of Fresno*, No. 75-1262, slip op. at 10 (U.S. Jan. 25, 1977).

"If anything is settled in the law, it is that a State may not discriminate against the Federal Government or its (Contractors). *See, e.g., Phillips Co. v. Dumas School District*, [*supra*]; *United States v. City of Detroit*, [*supra*]; *City of Detroit v. Murray Corp.*, 355 U.S. 489." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, at 751 (1961).

We conclude and declare that the imposition of the G.R.Tax upon Contractors discriminates against the Government in favor of private contractors, all in violation of the Supremacy Clause. We further conclude that the Government is entitled to permanent injunctive restraint against the State's future imposition of the G.R.Tax upon Contractors.

Government's Contention 1 [d]:

The facts disclose that the system of refunds and credits applicable to the G.R. Tax under the Act discriminates against out-of-state public contractors in favor of in-state public contractors to the extent of .02 of one percent, or two cents on each $100 of a bid amount.

We conclude that that amount in a dollar and cents discriminatory effect is de minimis and the

contention is without merit.

Government's Contention 1 [e]:

While the facts reveal that the existence of the Act with its imposition of the G.R. Tax upon Government Contractors tends to chill the field of federally qualified contract bidders, yet there is no substantial evidence in the record that the Government has been materially frustrated in its procurement law policy or mandate of choosing the lowest bidder on any specific project.

We conclude the issue is without merit.

Governments Contention 2:

We deem it expedient and in conservation of judicial time and effort that this issue of the Government's recovery of the overplus of the G.R.Tax paid to the State in excess of all allowable refunds and credits be remanded to the single judge District Court for disposition under further order by the Honorable Russell E. Smith, Chief Judge for the District.

The injunctive restraint of general fund disposition by the State of such overplus of G.R.Tax held by the State is to remain in force and effect until further order of the single judge District Court.

Neither party shall recover costs in these three-judge District Court proceedings.

This decision shall constitute the findings of fact and conclusions of law of this three-judge District Court as provided by Fed. R. Civ. P. 52 (a).

Counsel for the Government is requested to serve and submit within 25 days from the date hereof a proposed declaratory judgment and decree of permanent restraint in accordance with the foregoing decision.

Dated this _____day of _____,1977.

_____

U.S. SENIOR CIRCUIT JUDGE
s/ William G. East

U.S. SENIOR DISTRICT JUDGE

s/Russell E. Smith

UNITED STATES DISTRICT JUDGE

UNITED STATES v STATE OF MONTANA, NO.1989.

KILKENNY, Circuit Judge, Dissenting:

I dissent. For ease of reference, I prefer to state my own version of the relevant facts.

BACKGROUND

The Montana Act levies a 1% tax upon the gross receipts of "public contractors," defined to include all persons who perform contracts for the State of Montana, its subdivisions, and the United States Government (the federal government). The Act contains provision for refunds and credits: contractors who produce proof of payment of personal property taxes receive a *pro-rata* refund of taxes paid; the balance of the tax may be claimed as a credit against Montana personal income and corporate taxes.

In its 1971 action, the federal government sought both a declaratory judgment as to the constitutionality of the Act and an injunction prohibiting the collection of the tax and ordering a refund of the taxes previously collected. In May of 1971, this court, pursuant to a stipulation of the parties, granted a continuance until such time as the Montana courts could consider the Act. The Montana Supreme Court considered the Act on two occasions and ruled against the federal government both times.

In the first, *Peter Kiewit Sons' Co. v. State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 (1973) [*Kiewit # 1*], the federal government concedes that it was the real party in interest. Relevant to the present inquiry, *Kiewit # 1* resolved the following issues:

(1) It held that the Act did not have the effect of imposing a tax directly upon the federal government.
(2) It held that the statutory classification between public and private contractors was rational and constitutional such that there could be no discrimination against either the federal government or the public contractors.
(3) It held that there was no discrimination against the federal government because the Act complied with equal force to all public contractors.

In *Peter Kiewit Sons Co. v. Department of Revenue*, _____Mont. _____, 531 P.2d 1327 (1975) (*Kiewit # 2*), the Montana Supreme Court reaffirmed its earlier decision and held that *Kiewit # 1* was *res judicata*. It also held that a reasonable classification for tax purposes lay between public and private contractors and that the Act was a legitimate revenue raising device.

After the decision in *Kiewit # 1*, both parties moved for summary judgment in this court. The state, in arguing that the case should be dismissed under the authority of, *inter alia*, *England v. Medical Examiners*, 375 US.411 (1964), claimed that the federal government tried its case in the state courts and left no issues for decision by the federal court. This court, however, specifically declined to rule on these *res judicata* and collateral estoppel issues on the ground that at least "...some of the (federal) Government's presently asserted issues of violation of the Supremacy Clause remain viable and unfetted by any holding in *Kiewit* (#1). ..."
(Filed November 20, 1974).

Before us, the federal government advances the

same arguments it made in the state courts, and continues to maintain that the Act discriminates against it. The state takes the opposite position and, in addition, claims that the federal government is precluded from relitigating these issues on either *res judicata* or collateral estoppel principles.

PRELIMINARY CONSIDERATION

At various places throughout the majority opinion, *see, e.g.*, footnotes 1, 4, and 6, the majority intimates that its decision is based at least in part upon a view of the legislative history of the Act and the treatment given it by the Montana Supreme Court (in *Kiewit # 1*). The majority indicates that the Act has resulted in the raising of revenue, "all in the face of legislative and judicial disavowal of intent to do so." This is wrong and totally overlooks what the Montana Supreme Court said in *Kiewit # 2*. Kiewit made the same argument there: it argued that the Act was constitutional only insofar as it created a fund from which the state could secure the payment of income taxes and personal property taxes; any amount remaining after such payment, the argument goes, had to be refunded to the individual contractor. The Montana Supreme Court expressly rejected this argument:

> "Kiewit insists that the only basis for this Court's conclusion that the Act was not discriminatory as to the public contractors was that if the Act were properly enforced, it would result in a 'washout'; that is, refunds of personal

> property taxes and contrators' income taxes would offset the 1% gross receipts tax. *Kiewit reads our opinion much too narrowly. We held there that a reasonable classification for tax purposes lay between private and public contractors.*" (emphasis supplied). 531 P. 2d at 1328-9.

Clearly, the Supreme Court of the State of Montana held that the Act was a legitimate revenue raising device. We are faced, therefore, with only two general issues, the *res judicata*/collateral estoppel one, and the issue involving the propriety of the tax under the Supremacy Clause.

RES JUDICATA AND COLLATERAL ESTOPPEL

Because I disagree with the substantive holdings of the majority, it is unnecessary to even consider its treatment of the above issues. Nevertheless, it is important that I express my firm views on these issues.

At the outset, I must say that I am unable to understand the majority's treatment of this problem. It at no point distinguishes between the doctrines of *res judicata* and collateral estoppel in its one-paragraph discussion. On the basis of this court's November 20, 1974, decision (denying the summary judgment motions), the majority summarily concludes that "the Supremacy Clause issue" remains. This is a gross misinterpretation of that decision which concluded merely that "...*at the least, some* of the Government's presently asserted issues of violation of the Supremacy Clause remain viable and unfettered by any holdings in *Kiewit* (#1)...." (Emphasis supplied). The majority does not distinguish between the variety of Supremacy

Clause issues that were raised. Nor does it mention the issues that were tried and decided in *Kiewit #1*. [1]

[1] As relevant to the present inquiry, this court, in its 1974 decision, listed the following issues as among those considered in *Kiewit # 1*:

"(1) The 1% gross receipt tax did not entirely 'wash out' (the gross receipt tax collected aggregated more than the contractor's corporate income and personal property taxes which became payable to Montana and its subdivisions) upon the part of some non-resident contractors and tended to impose a higher overall tax liability to Montana upon those contractors than upon resident contractors. The Supreme Court concluded that this increased liability was due to those contractors' own action or fault and not to any discriminatory effect through the workings of the Act, and in any event, the effect of the non-washout of the receipts tax collections was of minor consequence and not of unconstitutional status.

"(2) As stated by the Supreme Court, (Kiewit's) primary argument' was that the 1% gross receipt tax is placed upon public construction contractors and not private construction contractors and is discriminatory and lacks equal treatment under the law. The Supreme Court reasoned and held, under Montana decisions based upon federal law, that the several classifications between 'public' and 'private' among contractors were rational, reasonable, and constitutional.

"In addition, the Supreme Court did deal with two issues of alleged discrimination against the Government, namely and as stated by that court:

"(a) The second half of the discrimination question raised by (Kiewit) is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties.' That argument was rejected through the rationale that the Government suffered no discrimination since the Act applied with equal force to Montana and its subdivisions in their public contracts. Nevertheless we point out that such a conclusion does not absolve the manifest adverse effect of the operation of the Act and regulations upon the *non-resident* prospective or firm *public* contractors and the favoritism allowed *resident* prospective or firm *public* contractors who hold a higher potential base of tax liability to Montana, thereby narrowing the field of public contractors open to the Government.

"(b) Finally, it (was) argued that this Act violates the immunity of the federal government from taxation or the economic impact of taxation.' This argument was rejected under federal law."

The majority leaves us in the dark as to the issues it feels remain and why.

For example, it here considers and upholds the propriety of the classification between resident and non-resident contractors even though it felt in 1974 that *Kiewit #1* had disposed of the issue. [2] Similarily, the majority completely avoids the fact that the Supremacy Clause issues (relied upon by it to invalidate the Act) were already decided by the Montana Supreme Court in *Kiewit #1*. In short, the majority's failure to indicate whether and to what extent the federal government is bound by the prior litigation has only obscured the nature of the issues to be decided.

England applies where the federal government "freely and without reservation" submits its federal claims for decision to the state courts. The federal government has not shown us when or how it informed the state courts of any intention to return to the federal court. On the record here presented, I can only conclude that the federal government did so submit its claims.

Moreover, in its conclusion that the Act was

[2] I find no indication in *Kiewit # 1* that this issue was in fact decided by the Montana Supreme Court such that we could not consider it. In its 1974 decision, however, see footnote 1, this court felt otherwise. Were I to reach the merits of this issue, in any event, I would be in complete agreement with the substantive holding of the majority that any discrimination is *de minimus*.

The happenstance difference in treatment referred to in the majority opinion (.44% v. .46%) does not approach constitutional dimension even though there is favoritism to the extent that resident contractors *are presumed* to have a higher potential base of tax liabilitly in the state of Montana. Each contractor, in any event, receives *identical tax treatment under the Act*. The Act itself makes no distinction.

unconstitutional on the two substantive grounds, the majority did not specifically consider the application of the collateral estoppel doctrine. From its conclusion that these two issues remained open after *Kiewit #1*, it says by implication that the doctrine would apply to bar consideraton of the issues if they had been presented in the state court. I agree with this implication, and think that the issues were raised.

I conclude that the federal government had the requisite control over the litigation in the state courts.[3] Having such control, it was bound by the outcome. *Drummond v. United States,* 324 U.S. 316 (1945). *See generally Expert Electric, Inc. v. Levine,* 554 F. 2d 1227 (CA2 1977); *American Safety Flight Systems v. Garrett Corp.,* 528 F.2d 288 (CA9 1975); *Aerojet General Corp. v. Askew,* 511 F. 2d 710 (CA5 1975), *cert. denied* 423 U.S. 908; *Troy Company v. Products Research Co.,* 339 F. 2d 364, 367 (CA9 1964); *petition for cert. dismissed, 381 U.S. 930 [1965].* *see also* 1B Moore's Federal Practice §0.411(6); Restatement of Judgments §84, Comment (e) (1942). At a minimum, therefore, the federal government is collaterally estopped from relitigating the issues that were tried in state courts. Thus, even if the *England* rule does not apply, I would conclude that the doctrine of collateral estoppel applies and that it precludes our consideration of the merits of the two substantive issues reached by the majority.

[3] To support its position that the federal government was bound by the decisions in the prior litigation, the State refers us to the *admitted* facts regarding the extent of the federal government's participation in *Kiewit # 1:*

(1) The federal government required that the lawsuit be filed by Peter Kiewit.

(2) The federal government reviewed and approved the complaint.

(3) The federal government paid the attorneys fees and costs involved in the action.

(4) The federal government directed the appeal from the state district court to the Montana Supreme Court.

(5) Before the Montana Supreme Court, the federal government appeared as *amicus curiae,* submitted a brief and participated in oral argument.

(6) The federal government was the real party in interest in the state court litigation.

(7) The federal government directed the filing of a notice of appeal to the United States Supreme Court.

(8) The federal government, through the Solicitor General, effectuated Kiewit's abandonment of its appeal to the United States Supreme Court.

The federal government maintains, *inter alia,* that the above facts demonstrate an insufficient amount of participation to say that it had a "laboring oar" in the state court controversy. *Drummond v. United States,* 324 U.S. 316 (1945). I disagree.

MERITS

Assuming, *arguendo,* that the merits are properly before us, I would oppose the majority views.

It concludes that the Act discriminates against the federal government and in favor of the state. Its conclusion, I believe, is fundamentally unsound.

The majority reasons that:

> "...the State would receive as general revenue that portion of the G.R. Tax remaining after allowing credits and refunds. ...Contra, the (federal) Government ... gets no return of the overplus of approximately 50 percent."

Thus, the majority correctly finds that this state tax results in state revenue (that portion of the tax retained after refunds and credits). It goes on, however, to erroneously find that the existence of this state revenue works a discrimination against the

federal government because there is no corresponding revenue to the federal government. This reasoning, if followed to its logical conclusion, would effectively invalidate the state taxes routinely upheld in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), and *James v. Dravo Contracting*, 302 U.S. 134 (1937).

Dravo, for example, involved a two percent gross receipts tax imposed by the state of West Virginia upon contractors performing work in the state. Dravo Contracting was constructing dams and locks in the area pursuant to a contract with the United States. The Court dismissed the constitutional challenges and upheld the tax despite the economic burden upon the federal government. Likewise, the Court in *King & Boozer* refused to invalidate a two percent Alabama sales tax which was passed on to the federal government contractors under a "cost-plus" contracts with the federal government:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." 314 U.S. at 8-9.

The reasoning of the majority *sub silentio* overrules this and other authority. In each of the above cases, the tax would apply equally to those doing work for the state government. Applying the reasoning of the majority, there is discrimination against the federal

government because the otherwise legitimately collected tax (general state revenue) reduces the state's net cost, thereby allowing it to spend less than the federal government. Thus, under the guise of discrimination against the federal government, any state tax could be traced backwards to defeat its own existence.

Nor can the federal government support its discrimination claim with statistics showing an economic impact upon it. *King & Boozer* and *Dravo* upheld taxes with a more severe economic impact than is present here. More recently in *United States v. Boyd*, 378 U.S. 39, 50-1 (1964), the Supreme Court expressed its approval of *Boozer* and its predecessors in clear and precise language as follows:

> "The principles laid down in *King & Boozer*, ...we think, strike a proper judicial accomodation between the *interests of the States' power to tax and the concerns of the Nation, they are workable, and we adhere to them.* If they unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its powers, not this Court, to make the desirable adjustment." (Emphasis supplied).[4]

---

[4] This same thought has been echoed by the Supreme Court on a number of other occasions. As long ago as 1943, *Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261, 270-1, the Court stated:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those

The proper test for discrimination is found in *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376 (1960), a case cited to us by both parties in support of their positions. *Phillips* dealt with a tax by the state of Texas on lessees of property from the federal government, which tax did not apply to lessees of property from the state of Texas as lessor. In striking down the state tax as discriminatory against the federal government, the Court laid down a relatively simple test:

> "...it does not seem too much to require that the State treat those who deal with the (federal Government as well as it treats those with whom it deals itself." *Id.* at 385.

The majority erroneously reads this case, and presumably this test, as supportive of its decision. The fact is, however, that all public contractors under the Montana Act, whether working for the

---

imposed on citizens of the United States within the state's borders, (citation). *And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system,* (citation)." (Emphasis supplied).

See also United States v. City of Detroit, 355 U.S. 466, 474 (1958):

"Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. (Citation). *Of course this is not to say that Congress, acting within the proper scope of its power, cannot confer immunity by statute where it does not exist constitutionally.* Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve." (Emphasis supplied).

state or the federal government, are treated in identical fashion; each of them is subject to the same one percent gross receipts tax. The state of Montana, therefore, does "treat those who deal with the (federal) government as well as it treats those with whom it deals itself." *Id.* The Montana courts came to this same conclusion and I think that they were correct. See also *International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (CA9 1974).

OTHER CLAIMS

With little more than a scant reference to the Act's "discriminatory effect upon it (the federal government) as an owner-builder...," the majority concludes that it is not precluded under the collateral estoppel doctrine from considering the propriety of the classification between public contractors and private contractors. Its collateral estoppel argument is, of course, without merit.[5] Moreover, its reference to a discriminatory effect upon the government is misplaced. This case would have been thrown out of court six years ago if the tax were being placed upon the federal government *as a contractor*. The fact is that it is not. The federal government complains only about the higher prices it must pay as a result of the tax upon its contractors.[6]

Its conclusion that the Act discriminates against the federal government and in favor of private parties, is meritless.

Because of its earlier holding of unconstitutional-

---

[5] *Kiewit # 1* decided this precise issue adverse to the contention of the federal government. *See* footnote 1, *supra.*

[6] This claim must be rejected. *See* text accompanying footnote 4.

ity, the majority" ... find(s) it unnecessary to pass upon the Equal Protection Clause issues or upon the questions of collateral estoppel arising as to them." It, nevertheless, then finds that:

> "...(h)owever, nothing in the issues raised presented, nor did the contractor Kiewit have standing to raise on behalf of the Government in *Kiewit*, the Government's current issue of the discriminatory effect upon it as an owner-builder by the imposition of the G.R. Tax upon its Contractors in violation of the Supremacy Clause." (Citation omitted).

Because the interests of the federal government are implicated, the majority correctly treats this "equal protection clause" issue as implicating the Supremacy Clause. *Kiewit # 1* did the same thing and cited the same Supremacy Clause cases, but it found the Act constitutional on this ground:

> "The second half of the discrimination question raised by appellant is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties. Appellant contends granting a preferred tax status to a substantial number of taxpayers, contractors performing work for private owners, and failing to grant a comparable status to construction contractors of the United States, constitutes unconstitutional discrimination against the United States and those with whom it deals."
>
> * * * * *
>
> "Here, we do not believe that the state of Montana has discriminated against the federal government." 505 P.2d at 109.

It is clear, therefore, that the next couple of pages of the majority disposition contain only *dicta* (because unnecessary to its findings of unconstitutionality), and bad *dicta* at that (because the issue was foreclosed on collateral estoppel grounds and because it is wrong on the merits). *Kiewit # 1* held that a valid tax classification lay between public and private contractors and I do not think that the federal government has shown otherwise. I find no evidence in the record to show that the federal government met its burden of proof. Testimony offered by the state of Montana, on the other hand, attests to the real and substantial differences between the two classes of contractors. For equal protection purposes, there is a very liberal standard of review and cases will be upheld if there is any conceivable basis which will support the classification. *See, e.g., Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910). *Cf. San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 40-1 (1973). Essentially the same test is applied in cases related to intergovernmental tax immunity under the Supremacy Clause. Chief Justice Warren in the *Phillips* case, however, indicated that the equal protection cases are not controlling, and that the (federal) government's interest must be weighed in the balance to ascertain whether the state treats similarly-situated constituents in a similar fashion. 361 U.S. at 385. As noted above, this condition is satisfied here in that all contractors are subject to the same exact tax. In that all contractors are subject to the same exact tax. In short, I think that the federal government has failed in its burden of showing the classification improper. In view of the standard of review. I would uphold the classification.

The balance of the federal government's arguments in support of its discrimination claim have been rejected in state court. If they were properly before us, I would find them meritless too.

In particular, the argument that the Act places the legal incidence of the tax upon the federal government is without merit. See 505 P2d at 110. A much stronger argument on this ground was available in *King & Boozer*, the situation involving a cost-plus contract where it is clear that the 2% tax was passed on to the federal government, but the Court upheld the state tax. Cases such as *United States v. Mississippi Tax Comm'n.*, 421 U.S. 599 (1975); *Agricultural Bank v. Tax Comm'n.*, 392 U.S. 339 (1968); and *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954) are clearly distinguishable.

CONCLUSION

Independent of the *res judicata* and collateral estoppel issues, I reject the majority's conclusion that the Act discriminates against the federal government and in favor of both the state of Montana and private parties within the state. The state has exercised its power to raise revenue in an even-handed fashion by taxing all those similarly situated (public contractors) in the same manner. *United States v. County of Fresno*, _____ U.S. _____ (1/25/77), slip op. at 10. *Cf. Kiewit # 2*, 531 P.2d at 1329; *State ex rel. Schultz Lindsay v. Board of Equalization*, 145 Mont. 380, 403 P. 2d 635 (1965). The contrary holding of the majority directly undermines all recent authority in this area. Any increased costs to the federal government, so heavily relied upon by the majority, are "but a normal incident of the organization within the same territory of two

independent taxing sovereignties...."[7] Additionally, private parties within the state are not illegally favored because the federal government is not in the same class with them.

I would reject all the government's contentions and dismiss its complaint with prejudice.

[7] See King & Boozer, supra, 314 U.S. at 9.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil No. 1989
Filed Dec. 15, 1977

UNITED STATES OF AMERICA,

Plaintiff,

—vs—

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W.A. GROFF, as Director of Revenue of and for the State of Montana, and his successors in office,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Montana, Department of Revenue of the State of Montana and W.A. Groff, as Director of Revenue of and for the State of Montana, and his successors in office, the Defendants above-named, hereby appeal to the Supreme Court of the United States from the whole of that Final Declaratory Judgment and Decree of Permanent Injunctive Relief dated October 17, 1977 and filed and entered on October 18, 1977.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

Dated this 15th day of December, 1977.

ROBERT CORCORAN, Chief Attorney,
Department of Revenue and ROBERT A. POORE
and TERRY B. COSGROVE,

Special Assistant Attorneys
General of the State of Montana

By S/Robert A. Poore

Attorneys for the Defendants
Suite 400, Silver Bow Block
Butte, Montana 59701

MONTANA'S CONTRACTORS' GROSS RECEIPTS TAX

[the Act]

84-3501. (2433.1) **Definitions.** The following words, terms, and phrases in this act are, for the purposes hereof, defined as follows:

(1) A "public contractor" within the meaning of this act shall include any person who submits a proposal to or enters into a contract for performing all public construction work in the state with the federal government. State of Montana, or with any board, commission, or department thereof or with any board of county commissioners or with any city or town council or with any agency of any thereof or with any other public board, body, commission, or agency authorized to let or award contracts for any public work when the contract cost, value, or price thereof exceeds the sum of $1,000.

(2) The term "public contractor" includes subcontractors undertaking to perform the work covered by the original contract or any part thereof, the contract cost, value, or price of which exceeds the sum of $1,000.

(3) "Gross receipts" means all receipts from sources within the state, whether in the form of money, credits, or other valuable consideration, received from, engaging in, or conducting a business, without deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, taxes, losses, or any other expense whatsoever. However, "gross receipts" shall not include cash discounts allowed and taken on sales and sales refunds, either in cash or by credit, uncollectible accounts written off from

time to time, or payments received in final liquidation of accounts included in the gross receipts of any previous return made by the person.

84-3502. (2433.2) **Unlawful to engage in public contracting business without license.** It shall be unlawful for any person or any combination of persons to engage in the business or act in the capacity of public contractor as herein defined within the state of Montana without having a license therefor as herein provided.

84-3503. (2433.3) **State department of revenue as registrar.** The state department of revenue of the state of Montana is hereby constituted the registrar for the purpose of this act, and is empowered to employ such assistance and to procure such records, supplies and equipment as may be necessary to carry out its provisions.

84-3504. (2433.4) **Application for license—contents.** To obtain a license under this act, the applicant shall submit, on such forms as the registrar shall prescribe, an application, under oath, which shall contain a statement of the applicant's experience and qualifications as a contractor; the value and character of contract work completed, and for whom performed during five (5) years prior to the filing of such application; and a complete financial statement on such forms and disclosing such information as shall be required by the registrar. Such application shall also contain such other information as may be requested by the registrar under such rules and regulations as may be adopted by said registrar and which will assist said registrar in determining the applicant's fitness to act in the capacity of a public contractor as defined in this act; and such application shall also contain a statement

that the applicant desires the issuance of a license under the terms of this act, and shall specify the class of license applied for as hereinafter provided.

84-3505. (2433.5) Classes of licenses—rights granted under licenses—fees.

(1) There shall be three (3) classes of licenses issued under the provisions of this act; and such classes of licenses are hereby designated as Classes A, B, and C. Any applicant for a license under the provisions hereof, shall specify in his application the class of license applied for.

(2) The holder of a Class A license shall be entitled to engage in the public contracting business within the state of Montana without any limitation as to the value of a single public contract project, subject, however, to such prequalification requirements as may be imposed by the public body or bodies referred to in section 84-3501 (1) and at the time of making the application for such license the applicant shall pay to the registrar a fee in the sum of two hundred dollars ($200).

(3) The holder of a Class B license shall be entitled to engage in the public contracting business within the state of Montana, but shall not be entitled to engage in the construction of any single public contract project of a value in excess of fifty thousand dollars ($50,000); and shall pay unto the registrar as a license fee the sum of one hundred dollars ($100) for such Class B license at the time of making application therefor.

(4) The holder of a Class C license shall be entitled to engage in the public contracting business within the state of Montana, but shall not be entitled to engage in the construction of any single public contract project of a value in excess of twenty-five

thousand dollars ($25,000); and shall pay unto the registrar as a license fee the sum of ten dollars ($10) at the time of making application therefor.

(5) In addition to the fees enumerated above, each public contractor shall pay to the state an additional license fee in a sum equal to one per cent (1%) of the gross receipts from public contracts during the income year for which the license is issued; provided, however, that the additional license fee hereby imposed shall not be paid upon or collectible from the gross receipts from any public contract which has been let to bid, upon which bids have been awarded, or which has been executed by a public body and a public contractor on the effective date of this act, and provided further, that the additional license fee shall be computed upon the basis of the entire contract for each separate contract let by any of the public bodies as specified in section 84-3501 (1). The prime contractor shall withhold the additional one per cent (1%) license fee from payments to his sub-contractors and inform the state department of revenue, on prescribed forms, of the amount of the additional one per cent (1%) license fee in his account to be allocated and transferred to the sub-contractor. The notification to transfer portions of the additional one per cent (1%) license fee must be filed within thirty (30) days after each payment is made to sub-contractors. If any prime contractor fails to file the required allocation and transfer report at the time required by or under the provisions of this act, a penalty computed at the rate of ten per cent (10%) of the additional one per cent (1%) license fee withheld from sub-contractors shall be due from the prime contractor.

(6) Nothing herein shall require any contractor to

pay any license fee on any public contract project of a value less than one thousand dollars ($1,000), nor shall any contractor be required to have a license hereunder in order to submit a bid or proposal for contracts advertised to be let by the Montana highway commission where federal aid is obtained from the bureau of public roads or the department of agriculture of the United States; neither shall a successful bidder be required to be licensed as provided herein before the awarding and execution of any contract to be let by the state highway commission where federal aid from the bureau of public roads or the department of agriculture of the United States is involved.

84-3506. (2433.6) **Investigation of applicant and granting of license—renewals—fees.** It shall be the duty of the registrar to investigate and determine the applicant's fitness to act in the capacity of public contractor, as defined in this act, and no license shall be issued unto such applicant until the expiration of ten (10) days from and after the filing of such application. The license so issued in pursuance of the first application shall entitle the licensee to act as a public contractor within this state, subject to the limitations of such license, until the expiration of the then current calendar year.

Any license issued under the provisions of this act may be renewed for each successive calendar year by obtaining from the registrar a certificate of renewal thereof. For the purpose of obtaining such certificate of renewals, the licensee shall file with the registrar an application therefor, stating the class of license applied for and containing the same information as that required in the application for the original license.

Application for such certificate of renewal must be made to the registrar on or before the first day of March of each successive calendar year; and such renewal certificate shall be good for the then current calendar year.

At the time of filing the application for a certificate of renewal, the applicant shall pay unto the registrar a license fee equal to fifty (50) per cent of the license fee for the original license; provided that if any applicant for a certificate of renewal shall apply for a renewal under a different class from the license theretofore issued to him, such new license shall only be issued upon the same showing and under the same terms and conditions and upon payment of the same fee required for the issuance of an original license.

All certificates of renewal, wherein the applicant does not apply for a change in the class of license shall be issued by the registrar to the applicant forthwith when the application is filed and the license renewal fee paid.

84-3507.(2433.7) **Bids to show bidder is licensed, is not presently working overtime on any incomplete contract, and class of bid.** All bids and proposals for the construction of any public contract project subject to the provisions of this act shall contain a statement showing that the bidder or contractor is duly and regularly licensed hereunder and is not presently working beyond the contract time, including authorized time extensions, on any previously awarded public contract project. The number and class of such license then held by such public contractor shall appear upon such bid or proposal, and no contract shall be awarded to any contractor unless he is the holder of a license in the class within which the value of the project shall fall

as hereinbefore provided, and unless the public contractor has completely executed any previous contract upon which he has worked beyond contract time.

84-3508. (2433.8) **Disposal of fees.** All moneys collected hereunder shall be deposited by the registrar with the state treasurer, who shall credit them to the general fund of the state.

84-3509.(2433.9) **Records**—public may inspect—certified copies—fees. The registrar shall maintain in said registrar's office at Helena, Montana, open to public inspection during office hours, a complete indexed record of all applications and all licenses issued and all certificates of renewal and of cancellations or suspensions thereof; and shall furnish a certified copy of any license issued, of renewal certificates, or of the cancellations or suspensions thereof, upon receipt of the sum of one dollar ($1.00); and such certified copy shall be received in all courts and elsewhere as prima facie evidence of the facts stated therein.

84-3510. (2433.10) **Complaints against licensee—grounds—investigation—hearing—suspension of license—appeals.**

(1) Any person or other organization may file a duly verified complaint with the registrar charging that the licensee is guilty of one or more of the following acts or omissions:

(a) abandonment of any contract without legal excuse;

(b) diversion of funds or property received under express agreement for prosecution or completion of a specific contract under this act or for a specified purpose in the prosecution or completion of any contract and their application or use for any other

contract, obligation, or purpose with intent to defraud or deceive creditors or the owner;

(c) the doing of any willful fraudulent act by the licensee as a public contractor in consequence of which another is substantially injured;

(d) the making of any false statement in any application for a license or renewal thereof;

(e) the failure to comply with the provisions of 82-1926 requiring preference of products manufactured or produced in this state by Montana industry and labor.

(2) Upon the filing of such complaint, the registrar shall investigate the charge and within 60 days after the filing of such complaint shall render and file said registrar's decision with said registrar's reasons therefor. If the registrar's decision be that the licensee has been guilty of any of such acts or omissions, said registrar shall suspend the contractor's license. At any time within 20 days thereafter the complainant or the contractor may petition the registrar for a rehearing. In the order granting or denying such rehearing, the registrar shall set forth a statement of the particular grounds and reasons for said registrar's actions on such petition and shall mail a copy of such order to the parties who have appeared in support of or in opposition to the petition for rehearing. If a rehearing be granted, the registrar shall set the matter for further hearing on due notice to the parties and, within 30 days after submission of the matter, serve said registrar's decision after rehearing in like manner as an original decision.

(3) The filing of such petition for rehearing as to the registrar's actions in suspending or canceling such license shall suspend the operation of such action

and permit the licensee to continue to do business as a public contractor pending final determination of the controversy.

(4) Within 30 days after the decision on rehearing, any party aggrieved by such decision of the registrar may appeal therefrom to the district court in and for the county in which the licen[illegible] under this act resides or does business as a public contractor by serving upon the registrar a notice of such appeal. The matter shall thereupon be heard de novo by the district court. An appeal may be taken from the decision of the district court in the same manner as appeals in other civil cases.

(5) In all cases where the licensee has filed his notice of appeal from the decision of the registrar or from the decision of the district court, such licensee shall be entitled to continue to do business as a public contractor pending final decision of the controversy.

84-3511. (2433.11) Relicensing not to be within year of cancellation. After cancellation of a license such licensee shall not be relicensed during the current calendar year in which the offense was committed.

84-3512. (2433.12) Penalty for acting without license. Any person or other organization acting in the capacity of public contractor within the meaning of this act without a license as herein provided shall be guilty of a misdemeanor and shall upon conviction thereof, if an individual, be punished by a fine of not to exceed $500 or by imprisonment in the county jail for a term not to exceed 6 months or by both such fine and imprisonment, in the discretion of the court. The same penalties shall apply upon conviction to any member of a partnership or to any construction,

managing, or directing officer of any corporation or other organization consenting to, participating in, or aiding or abetting any such violation of this act.

84-3513. Retention of contract payments to pay assessments—transmittal to department of revenue—contractor to pay when funds not retained—refunds. The state, county, city or any agency or department thereof, as described in section 84-3501 (1), for whom the contractor is performing public work, shall withhold, in addition to other amounts withheld as provided by law, one per cent (1%) of all payments due the contractor and shall transmit such moneys to the state department of revenue. In the event that the one per cent (1%) of gross receipts is not withheld as provided, the contractor shall make payment of these amounts to the state department of revenue within thirty (30) days after the date on which the contractor receives each increment of payment for work performed by the contractor. Any overpayment of the one per cent (1%) of gross receipts withheld, or paid by any contractor hereunder, shall be refunded by the state department of revenue at the end of the income year upon written application therefor.

84-3514. Corporate license tax credit—additional license fees—treatment of personal tax as credit. The additional license fees withheld or otherwise paid as provided herein may be used as a credit on the contractor's corporation license tax provided for in Title 84, chapter 15, R.C.M. 1947, or on the contractor's income tax provided for in Title 84, chapter 49, R.C.M. 1947, depending upon the type of tax the contractor is required to pay under the laws of the state.

Personal property taxes paid in Montana on any

personal property of the contractor which is used in the business of the contractor and is located within this state may be credited against the license fees required under this act. However, in computing the tax credit allowed by this act against the contractor's corporation license tax or income tax, the personal property tax credit against the license fees herein required shall not be considered as license fees paid for the purpose of such income tax or corporation license tax credit.

84-3515. State department of revenue to establish rules and regulations. The state department of revenue shall establish rules and regulations necessary for the effective implementation of the provisions of this act, including, but not limited to, requiring public contractors to file a contractor's return showing public works contracts performed during a calendar year.

84-3516. Failure to file contractor's license—penalty. A person failing to file a contractor's license return as provided and required by the state department of revenue, upon conviction, shall be fined not less than one thousand dollars ($1,000) or more than ten thousand dollars ($10,000).

(Federal Title of Court and Cause)

STIPULATION FOR CONTINUANCE

Filed 5/25/71

It is hereby stipulated by and between the parties hereto, through their respective counsel of record, that the above-entitled matter may be continued by the Court without date or until further order of the Court pending the resolution in the state courts of Montana or appeals therefrom of the case of *Peter Kiewit Sons' Co., a corporation -vs- State Board of Equalization, et al.*, which is Cause No. 34,859 of the files of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark. It is understood by the parties that reasonable efforts will be made to expedite a final decision in the *Peter Kiewit* case.

It is further stipulated and agreed that from and after this date all license fees or revenues collected by the defendant Board pursuant to Chapter 35 of Title 84, R.C.M. (1947) shall be retained by said Board and not transferred to the general funds of the State until this Federal Court action is finally resolved or until further order of this court; however, such funds may be used by the Board in the ordinary course of administering said act—including making refunds and credits to public contractors.

And it is further stipulated and agreed that the excess of said retained fund over the gross amount of $500,000 shall be invested by said Board in interest-bearing United States notes or bonds. Said investment of these funds is pursuant to this Stipulation and Court order. The said United States notes or bonds shall be held and possessed by said Board. In the event the Plaintiff prevails in the above entitled matter all refunds paid to federal contractors

shall include a prorata portion of the above mentioned interest or earnings; in the event the Defendants prevail in the above entitled action, the above mentioned fund together with the interest or earnings shall be paid over to the State Board of Equalization.

DATED this 24th day of May, 1971.

UNITED STATES OF AMERICA

By Otis L Packwood

Its Attorney

Plaintiff

ROBERT L. WOODAHL, Attorney General
of the State of Montana;
EDWARD JENE BELL, Tax Counsel,
State Board of Equalization; and
POORE, McKENZIE & ROTH, Special
Assistant Attorneys General

By s/Edward Jene Bell

One of Their Attorneys

Defendants

ORDER FOR CONTINUANCE

Pursuant to the foregoing Stipulation, and good cause appearing therefor,

IT IS HEREBY ORDERED that the above-entitled matter be and the same hereby is continued without date or until further order of the Court pending the resolution in the state courts of Montana or appeals therefrom of the case of *Peter Kiewit Sons' Co., a corporation -vs- State Board of Equalization, et al.*, described in said Stipulation; that from and after this date the defendant Board

shall retain all license fees or revenues collected pursuant to Chapter 35 of Title 84, R.C.M. (1947) and not transfer the same to the general funds of said State until this Federal Court action is finally resolved or until further order of this court, however, such funds may be used by the Board in the ordinary course of administering said act—including making refunds and credits to public contractors; and that the excess of said retained fund over the gross amount of $500,000 shall be invested by said Board in interest-bearing United States notes or bonds, that said United States notes or bonds shall be held and possessed by said Board, and that in the event the Plaintiff prevails in the above entitled matter all refunds paid to federal contractors shall include a prorata portion of the above mentioned interest or earnings, however, in the event the Defendants prevail in the above entitled action, the above mentioned fund together with the interest or earnings shall be paid over to the State Board of Equalization.

DATED this 25th day of May, 1971.

Hon. James R. Browning,
Hon. Russell E. Smith,
Hon. William G. East

By s/ Russell E. Smith

(Federal Title of Court and Cause)

NOTICE OF ENTRY OF FINAL JUDGMENT BY SUPREME COURT OF THE STATE OF MONTANA;MOTIONS TO DISMISS FEDERAL DISTRICT COURT ACTION AND TO RELEASE ALL GROSS RECEIPTS TAX FUNDS FROM SEQUESTRATION; CITATIONS OF AUTHORITIES

---

a) NOTICE OF ENTRY OF FINAL JUDGMENT BY SUPREME COURT OF THE STATE OF MONTANA

TO: HONORABLE JAMES R. BROWNING, HONORABLE RUSSELL E. SMITH, and HONORABLE WILLIAM G. EAST, Judges Presiding:

and

TO: THE UNITED STATES OF AMERICA and HONORABLE OTIS L. PACKWOOD, Its Attorney:

It will be remembered and the file in the above-entitled matter will show: That on May 24, 1971, the above-entitled Court made and entered its Order for Continuance whereby the matter was continued without date pending the resolution in the courts of the State of Montana of the case of *Peter Kiewit Sons' Co. -vs- State Board of Equalization et al.;* and further,

That also by said Order of May 24, 1971, the above-entitled Court ordered the fees and revenues collected pursuant to Chapter 35 of Title 84, R.C.M. (1947) in part sequestered; and further,

That said State Court action of *Peter Kiewit Sons' Co. -vs- State Board of Equalization et al.* as Cause

No. 34,859 was tried in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark before Honorable Victor H. Fall and Judgment in favor of the defendants and sustaining the constitutionality of the Act in question and against Peter Kiewit and against the contentions of the United States of America as mirrored in the above-entitled action was entered on November 30, 1971, and notice of such entry given in the above-entitled action on December 20, 1971; and further,

That thereafter said plaintiff, Peter Kiewit Sons' Co. perfected an appeal from said State District Court judgment to the Supreme Court of the State of Montana which is the highest court of the State of Montana,

NOW THEREFORE PLEASE BE ADVISED that on January 10, 1973, said Supreme Court of the State of Montana unanimously affirmed the State District court judgment of said Judge Victor H. Fall and although the appellant, Peter Kiewit Sons' Company, filed a Petition for Rehearing, such Petition was denied by Per Curiam Order of said Supreme Court dated January 29, 1973, and on the same date said Supreme Court issued its remittitur to the Clerk of said Montana District Court from whence said appeal had been perfected, and said Judgment is now final. That true and correct copies of the Supreme Court's opinion and of its Order denying said Petition for Rehearing and its Remittitur are affixed hereto.

b) MOTIONS TO DISMISS ABOVE-ENTITLED ACTION AND TO RELEASE ALL GROSS RECEIPTS

TAX FUNDS FROM SEQUESTRATION

Come now the defendants in the above-entitled matter and by virtue of the judgments, recited above, made and entered in the Courts of the State of Montana respectfully move the above-entitled Court to Dismiss the above-entitled action upon the following grounds and reasons:

1. That the opinion of the Supreme Court of the State of Montana affirming Judge Fall's Judgment upholding the constitutionality and validity of the Act in question against the challenges of its being requgnant to the Constitution of the United States is now the law of the State of Montana on the precise issues raised in the above-entitled action, and
2. That no court of the United States, other than the Supreme Court on appeal or certiorari, has jurisdiction to review, vacate, or annul said State Court Judgment.

   Parnacher -vs-Mount, (C.A. Okl. 1953), 207 F. (2d) 788, cert. denied 74 S. Ct. 515, 347 U.S. 917, 98 L. Ed. 1072, and
3. The above-entitled Federal District Court is without jurisdiction to endeavor to change or modify said State Court judgment and is under duty to dismiss this suit since any errors complained of in said State Court judgment could be reviewed only by the Supreme Court of the United States.

   Williams -vs- Tooke (CCA Tex 1940), 108 F. (2d) 758. Cert. Denied 61 S. Ct. 8, 311 U.S. 655, 85 L. Ed. 419

Daniel B. Frazier Co. -vs- Long Beach Tp., Ocean County, N.J., C.C.A.N.J. 1935, 77 F. (2d) 764

Atlantic Coast Line R. Co. -vs- Brotherhood of Locomotive Engineers, 90 S. Ct. 1739, 398 U.S. 281, 26 L. Ed. (2d) 234

Aris -vs- Big Ten Taxi Corp., C.A. Fla 1971, 441 F. (2d) 536
28 U.S.C.A. Sec. 1257; note 8

4. Since the above-entitled Court has no jurisdiction to review, vacate or annul said State Court judgment and is under duty to dismiss this suit as per the foregoing authorities, it is powerless and without jurisdiction to endeavor to continue to sequester or otherwise control the State of Montana's use of funds collected under said act in question.

Respectfully submitted,
ROBERT L. WOODAHL, Attorney General of the State of Montana;
EDWARD JENE BELL, Tax Counsel, Board of Equalization; and
POORE, McKENZIE & ROTH, Special Assistant Attorneys General

By s/Robert A. Poore
One of Their Attorneys

Defendants

(Federal Title of Court and Cause)

AMENDED STIPULATION FOR CONTINUANCE

Filed 5/3/73

The parties to this action, through their undernamed attorneys, having entered into a Stipulation dated May 24, 1971, which Stipulation was incorporated into ths Court's Order for Continuance dated May 24, 1971, now desire to amend said Stipulation and Order to provide as follows:

(1) That the above-entitled matter may be continued by the Court without date or until further order of the Court pending the final resolution of the case of *Peter Kiewit Sons' Co., a Corporation v. State Board of Equalization, et al.*, which was Cause No. 34,859 of the files of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, including any and all appeals to the United States Supreme Court or otherwise. It is understood by the parties that reasonable efforts will be made to expedite a final decision in the *Peter Kiewit* case.

(2) That defendant State Board of Equalization shall retain $948,314.44 in United States Treasury Bills with a $1,000,000 par value at August 28, 1973 maturity date, and $476,666.67 in United States Treasury Bills with a $500,000 par value at October 23, 1973 maturity date, which amounts were invested pursuant to the Stipulation and Order dated May 24, 1971.

(3) That from and after this date all license fees, gross receipts taxes or revenues collected by the defendant Board pursuant to Chapter 35 of Title 84, R.C.M. 1947, shall not be sequestered or otherwise controlled by the Court but may be transferred by said Board to the general funds of the State; provided, however, that if the net refund amount (which

is the gross amount of funds paid under protest less amounts taken as refunds or credits) exceeds the amount invested as stated in paragraph 2 above, the defendant Board shall invest additional monies in interest bearing United States notes or bonds on a dollar for dollar basis equal to the excess of the net refund amount.

(4) That in the event the plaintiff finally prevails in this above-entitled federal action, all refunds paid to the United States or its federal contractors shall include a pro rata portion of the above-mentioned interest or earnings; in the event the defendants prevail, the above-mentioned fund, together with the interest or earnings, shall be paid over to the State Board of Equalization.

DATED this 2nd day of May, 1973.

STATE OF MONTANA

UNITED STATES OF AMERICA

BY:

ROBERT L. WOODAHL, Attorney General of the State of Montana;
EDWARD JENE BELL, Chief Tax Counsel, State Board of Equalization; and POORE, McKENZIE & ROTH, Special Assistant Attorneys General

BY: Edward Jene Bell

UNITED STATES OF AMERICA

BY:

OTIS L. PACKWOOD
United States Attorney

BY: Otis L Packwood
United States Attorney

OF COUNSEL

SCOTT P. CRAMPTON
Assistant Attorney General
JOHN J. McCARTHY, Chief
General Litigation Section
CHARLES E. STRATTON, Trial
Attorney
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 2530
(202) 739-3056

ORDER FOR CONTINUANCE

Pursuant to the foregoing Amended Stipulation, and good cause appearing therefore,

IT IS HEREBY ORDERED that the Order for Continuance entered in this matter on May 24, 1971, is set aside.

IT IS FURTHER HEREBY ORDERED that the above-entitled matter be and the same hereby is continued without date or until further order of the Court pending the final resolution, by the United States Supreme Court or otherwise, of the case of *Peter Kiewit Sons' Co., a Corporation v. State Board of Equalization, et al.*, as described in said Amended Stipulation; that defendant Board shall retain the United States Treasury Bills in the amounts of $948,314.44 and $476,666.67 which were invested pursuant to the Stipulation and Order dated May 24, 1971; that from and after this date all license fees, gross receipts taxes or revenues collected by the defendant Board pursuant to Chapter 35 of Title 84, R.C.M. 1947, shall not be sequestered or otherwise controlled by this Court but may be transferred from said Board to the general funds of the State in accordance with said Amended Stipulation; and that

in the event the plaintiff prevails in the above-entitled federal action, all refunds paid to the United States or its federal contractors shall include a pro rata portion of the above-mentioned interest or earnings, however, in the event the defendants prevail, the above-mentioned fund, together with the interest or earnings shall be paid over to the State Board of Equalization.

DATED this 3rd day of May, 1973.

Hon. James R. Browning,
Hon. Russell E. Smith
Hon. William G. East

BY Russell E. Smith

(Federal Title of Court and Cause)

RENEWAL OF PENDING MOTION TO DISMISS
AND
MOTION TO ABATE ORDER FOR CONTINUANCE
Filed 9/17/73

TO: HONORABLE JAMES R. BROWNING, HONORABLE RUSSELL E. SMITH, and HONORABLE WILLIAM G. EAST, Judges Presiding:

and

TO: THE UNITED STATES OF AMERICA and HONORABLE OTIS L. PACKWOOD, Its Attorney:

It will be remembered and the file in the above-entitled matter will show that on or about February 7, 1973 the defendants filed Motions to Dismiss the above-entitled Federal Court Action and to Release All Gross Receipts Tax Funds from Sequestration. Appurtenant to such Motions was a recitation of the history of the parallel litigation in the state courts of the State of Montana of the case of *Peter Kiewit Sons' co. -vs- State Board of Equalization et al.*

Subsequent to the filing of said Motions to Dismiss and to Release Funds the parties hereto entered into certain Stipulations (and amendments) for Continuance of the above-entitled matter without conducting a hearing of said pending Motions; and pursuant thereto and by its order of May 3, 1973, the above-entitled Court made and entered its Order for Continuance "without date or until further order of the Court pending the final resolution by the United States Supreme Court or otherwise of the case of *Peter Kiewit Sons' Co.*, a Corporation -vs- *State Board of Equalization, et al.*"

That at the time of this Court's making its said order of May 3, 1973, Peter Kiewit Sons' Co. was in the process of perfecting an appeal to the Supreme Court of the United States from the adverse decision of the Supreme Court of the State of Montana,—the latter Court having decided in said litigation that Chapter 35 of Title 84, R.C.M. (1947) was in nowise unconstitutional as contended both by Peter Kiewit in the State Court litigation and by the United States of America in the above-entitled Federal suit. *Peter Kiewit Sons' Co.* -vs- *State Board of Equalization of the State of Montana, et al,* 30 State Reporter 32, 505 Pac. (2d) 102 decided January 10, 1973.

Subsequent to said order of May 3, 1973, Peter Kiewit filed that certain Motion to Dismiss Appeal in the Supreme Court of the State of Montana a true copy of which is attached hereto as Exhibit "A"; and thereafter and on August 17, 1973 said Supreme Court of the State of Montana dismissed said appeal to the Supreme Court of the United States as per Exhibit "B" hereto.

That by virtue of the foregoing there has now been a "final resolution" of the state court litigation within the specification of the Court's Order for Continuance of May 3, 1973, and the defendant, State of Montana, hereby moves that the Order for Continuance be abated and that the pending Motion to Dismiss of the State of Montana be set for hearing.

DATED this 17th day of September, 1973.

Respectfully submitted,

ROBERT L. WOODAHL, Attorney
General of the State of Montana;

EDWARD JENE BELL, Tax Counsel,
Board of Equalization; and
POORE, McKENZIE, ROTH ROBISCHON &
ROBINSON, Special Assistant
Attorneys General
By s/Robert A. Poore

One of their attorneys
Defendants

(Federal Title of Court and Cause)

MOTIONS FOR LEAVE TO SPECIFY ADDITIONAL GROUND FOR GRANTING DEFENDANTS' PENDING MOTION TO DISMISS AND TO TREAT SUCH MOTION TO DISMISS AS ONE FOR SUMMARY JUDGMENT
Filed 12/12/73

A. Defendants move the Court for leave to amend their pending Motion to Dismiss filed herein on February 7, 1973, by the addition thereto of the following ground No. "5":

> "5. That the plaintiff caused and elected to have all of the issues raised in the above-entitled action and specifically all of its challenges to the constitutionality of the Montana Act here in question (Chapter 35 of Title 84, R.C.M. (1947, as amended) to be fully litigated in the District and Supreme Courts of the State of Montana in the case of *Peter Kiewit Sons Co. -vs- State Board of Equalization of the State of Montana et al.*, (505 P. (2d) 102, 1973); and thereafter plaintiff affirmatively waived a right of appeal from the adverse decision of said Montana Supreme Court to the Supreme Court of the United States; and plaintiff having reserved no material issue for litigation in the above-entitled action, plaintiff therefore now has no right to endeavor to return to the above-entitled Court and re-litigate issues presented to and resolved by the State Courts."

B. Defendants further move the Court under Rule 12(b) F.R. Civ. Pr. to receive matters outside the

pleadings and particularly to receive the attached Affidavit of Robert A. Poore and the documents identified and specified in said Affidavit in support of said pending Motion to Dismiss as supplemented by ground No. "5." next above, and upon having received such outside matters to treat said Motion to Dismiss as one for summary judgment to be disposed of as provided in Rule 56, F.R. Civ. Pr..

The grounds for the foregoing Motions are that justice requires that for proper disposition of Defendants' pending Motion to Dismiss that this Court be fully apprised of the events and proceedings conducted by or on behalf of the parties hereto in the State Courts of the State of Montana since the time on May 24, 1971, when the parties stipulated for a continuance of this case; and of the legal import on this case of such events and proceedings.

DATED this 11th day of December, 1973.

ROBERT L. WOODAHL, Attorney General
of the State of Montana;
TERRY B. COSGROVE, Tax Counsel,
State Board of Equalization; and
ROBERT A. POORE, Special Assistant
Attorney General

By s/Robert A. Poore .....
Attorneys for Defendants
Fourth Floor, Silver Bow Block,
Butte, Montana 59701

(Federal Title of Court and Cause)

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Before: BROWNING, Circuit Judge, and EAST and SMITH, District Judges*

PER CURIAM: Filed 11/20/74

THE CASE

The plaintiff above named (Government) instituted this action against the State of Montana and the Montana State Board of Equalization, and members thereof, (Montana) seeking declaratory judgment and injunctive relief from the workings and enforcement of the Montana legislation designated as Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended by Chapter 195 of the laws of 1967, and the pertinent rules and regulations promulgated thereunder (Act and regulations), and obtaining a refund of taxes heretofore imposed and collected from the Government and its contractors.

The Government alleges:

The Congress, in the Armed Services Procurement Act of 1947 (Title 10, United States Code, Sections 2301 to 2314, among others), and Government Procurement Regulations (32 CFR Sections 1.901 to 1.908-6, among others), has provided for standards or factors to determine and insure the fitness, qualifications, responsibility and reliability of persons and companies contracting with the Federal Govern, ment, including those construction contractors and subcontractors who are presently employed or under contract with the Federal Government in the State of Montana;

The Government, in the performance of its governmental functions, has entered and will enter into contracts for the employment of contractors and subcontractors to perform construction work within

Montana to erect, build, excavate, alter and repair buildings, structures and installations for itself, its agencies and instrumentalities, including its Department of the Army;

The Act and regulations, as enforced by Montana, require contractors and subcontractors, in order to submit bids or proposals to the Federal Government or to enter into contracts with the Federal Government for performing public construction work or to perform their contractual obligations with the Federal Government, (a) to obtain a Public Contractor's License (Section 84-3502 of the license fee statute provides that it is unlawful for a person to engage in the business or act as a public contractor in Montana without having a Public Contractor's License),(b) to be subject to licensing requirements and regulations and to meet standards or grounds to determine fitness and responsibility which are similar in part to the hereinbefore described grounds for finding responsibility and fitness under the hereinbefore described federal statute and regulations, (c) to pay a license fee ($10 to $200), and (d) to pay an additional 1% license fee or tax on gross receipts derived from or measured by the value of contracts with the Federal Government;

Government has incurred and will continue to incur liability for license fees or taxes imposed upon and collected by Montana from federal contractors and subcontractors under the application of the Act and regulations in that Government's contractors and subcontractors have passed and will continue to pass the cost of such taxes or license fees on to Government because provisions of the contracts involved require the Government to reimburse said contractors and subcontractors for the amounts remitted by

them to Montana in amounts in excess of $10,000.

The Government asserts that the Act and the enforcement thereof as aforesaid by Montana contravene the constitution and laws of the United States of America, and asserts these issues of constitutional infringements and violations (issues):

(a) Illegally discriminate against the Government and its agencies and instrumentalities, and those with whom it does business;
(b) Illegally impose a tax on Government's contractors and subcontractors which is not uniform upon the same class of subjects;
(c) Illegally and improperly interfere with the Government's power to select contractors and are in conflict with federal law and policy regulating federal procurement;
(d) Illegally violate the immunity of the Government and its instruments from state control in the performance of their functions;
(e) Illegally frustrate the federal policy of selecting the lowest possible bidder; and
(f) Illegally constitute a review by Montana over the federal determination of responsibility and fitness of its contractors and subcontractors.

For the purpose of this decision, we categorize the first two issues as falling within the equal treatment under the law guarantees of the United States Constitution, and the remaining four issues as falling within the Supremacy Clause protection.

JURISDICTION

We note the jurisdiction of this court under §§1345, 2201, and 2281, *et seq.*, *Title 28 U.S.C.*

ORDER OF CONTINUANCE

This cause was set for a hearing upon the Govern-

ment's motion for a preliminary injunction on May 24, 1971. Among the claims to be heard was Montana's assertion that this court "should abstain from acting (on Government's claims) pending disposition in the First Judicial District Court, Lewis and Clark County, Montana, (District Court) of a prior pending case, *Peter Kiewit Sons' Co., a corporation, Plaintiff, v. State Board of Equalization of the State of Montana, et al.* [*Kiewit*].

On the day and just prior to the hour of hearing, Government and Montana entered into a stipulation for the continuance of this cause which provides in its pertinent parts that:

> This cause "may be continued by the Court without date or until further order of the Court pending the resolution in the state courts of Montana or appeals therefrom of the case of [*Kiewit*]. It is understood by the parties that reasonable efforts will be made to expedite a final decision in [*Kiewit*].
>
> "It is further stipulated and agreed that from and after this date all license fees or revenues collected by the defendant Board pursuant to (the Act) shall be retained by said Board and not transferred to the general funds of the State (Montana) until *this Federal Court action is finally resolved* or until further order of this court; however, such funds may be used by the Board in the ordinary course of administering said act—including making refunds and credits to public contractors.
>
> "And it is further stipulated and agreed that the excess of said retained fund over the gross amount of $500,000 shall be invested by said Board in interest-bearing United States notes or bonds. Said investment of these funds is pursuant to this Stipulation and Court order." (Emphasis supplied).

Then follows provisions for the distribution of the principal and accruing interest of such notes and bonds to the *prevailing party in this cause* respectively.

The stipulation was approved and this cause continued "without date or until further order of the Court," all in accordance with the stipulation by order of Chief Judge Smith, as a member of this 3-Judge District Court.

Thereafter the District Court adjudicated *Kiewit* adversely to Kiewit's state law and the United States constitutional claims, and entered an order dismissing Kiewit's complaint and cause. Kiewit appealed from that adjudication and order of dismissal to the Supreme Court of Montana (Supreme Court). The Government appeared in that appeal amicus curiae. The Supreme Court affirmed, 30 Mont. 32, 505 P.2d 102, 1973.

Following that decision and pending consideration of further appeal, the parties in these proceedings entered into an amended stipulation for continuation which acknowledged the prior stipulation and order of continuance and provided in substance that these proceedings be further continued and for the release from sequestration future receipt tax payments but for the retention of such payments to date. This court approved that stipulation and ordered further continuance of the proceedings.[1]

---

[1] For the purposes of this phase, we assume in *arguendo* that the orders of continuance were orders of abstention and note that the abstention doctrine allows federal courts, in appropriate cases, to

Kiewit did not ultimately perfect an appeal to the United States Supreme Court, and the affirmance is now final.

MOTIONS UNDER SUBMISSION

Montana has moved that the Government's complaint and cause be dismissed, which motion is now considered as a Motion for Summary Judgment as provided for in Rule 56, Federal Rules of Civil Procedure, primarily on the grounds:

> "That the plaintiff caused and elected to have all of the issues raised in the above-entitled action and specifically all of its challenges to the constitutionalitly of the Montana Act here in question (Chapter 35 of Title 84, R.C.M. (1947), as amended) to be fully litigated in the District and Supreme Courts of the State of Montana in (Kiewit); and thereafter plaintiff affirmatively waived a right of appeal from the adverse decision of said Montana Supreme Court to the Supreme Court of the United States; and plaintiff having reserved no material issue for litigation in the above-entitled action, plaintiff therefore now has no right to endeavor to return to the above-entitled Court and re-litigate issues presented to and resolved by the State Courts."

defer deciding federal constitutional questions pending determination by state courts of unsettled questions of state law entwined in the federal questions. *Meridian v. Southern Bell T. & T. Co.*, 358 U.S. 639, 640 (1959); *United Gas Co. v. Ideal Cement Co.*, 369 U.S. 134, 135-136 (1962). We "made this clear only last Term in ...*Button, supra*,...at 427, when we said that 'a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim.' We also made clear in *Button*, however, that a party may elect to forego that right." *England v. Medical Examiners, infra*. We do not today decide and hold open the query whether or not the Government under the facts and circumstances presented "freely and without reservation" submitted its federal constitutional claims to the courts of Montana for final decision. *England, infra*, at 419, 421 and 422.

The Government has also moved for Summary Judgment, and the cross motions for Summary Judgment have been submitted on the record. We deny each of the cross motions.

MONTANA'S MOTION FOR SUMMARY JUDGMENT

Montana urges that the issues raised in *Kiewit* were substantially the same, if not identical, with the issues raised in these proceedings, and further, that following the order of continuance herein, the Government was the financing and moving party to the litigation in *Kiewit* in the Montana courts. Accordingly, urges Montana, the issues raised herein are res judicata under the rationale and holdings enunciated in *England v. Medical Examiners*, 375 U.S. 411 (1964), as extended in *Drummond v. U.S.*, 324 U.S. 316 (1945),[1] and if not, the doctrine of collateral estoppel bars the Government herein. 1B Moore's Federal Practice ¶ 0.405, pages 621-622 and 632-633; *Vanderveer v. Erie Malleable Iron Company*, 238 F.2d 510 (CA3, 1956).

A scrutiny of the decision of the Supreme Court reveals that the court opined that the purpose of the Act was "to require some (non-resident contractors) of the contractors working in the state to meet their

[1] We assume in *arguendo* that the Government was a party to Kiewit in the sense and context as utilized in *Drummond*.

(Montana corporate, income and personal property) tax responsibilities" and generally that the Act was valid. These issues of United States' constitutional infringement upon Kiewit, the Government contractor, were dealt with:

(1) The 1% gross receipt tax did not entirely "wash out" (the gross receipt tax collected aggregated more than the contractor's corporate income and personal property taxes which became payable to Montana and its subdivisions) upon the part of some non-resident contractors and tended to impose a higher overall tax liability to Montana upon those contractors than upon resident contractors. The Supreme Court concluded that this increased liability was due to those contractors' own action or fault and not to any discriminatory effect through the workings of the Act, and in any event, the effect of the non-washout of the receipts tax collections was of minor consequence and not of unconstitutional status.

(2) As stated by the Supreme Court, "Kiewit's) primary argument" was that the 1% gross receipt tax is placed upon public construction contractors and not private construction contractors and is discriminatory and lacks equal treatment under the law. The Supreme Court reasoned and held, under Montana decisions based upon federal law, that the several classifications between "public" and "private" among contractors were rational, reasonable, and constitutional.

In addition, the Supreme Court did deal with two issues of alleged discrimination against the Government, namely and as stated by that court:

(a) "The second half of the discrimination question raised by (Kiewit) is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United States and other public bodies as well as it treats private nongovernmental parties." That argument was rejected through the rationale that the Government suffered no discrimination since the Act applied with equal force to Montana and its subdivisions in their public contracts. Nevertheless we point out that such a conclusion does not absolve the manifest adverse effect of the operation of the Act and regulations upon the *non-resident* prospective or firm *public* contractors and the favoritism allowed *resident* prospective or firm *public* contractors who hold a higher potential base of tax liability to Montana, thereby narrowing the field of public contractors open to the Government.

(b) "Finally, it (was) argued that this Act violates the immunity of the federal government from taxation or the economic impact of taxation." This argument was rejected under federal law.

(c) The Supreme Court also held "as did the district court, that the provisions of the Act which pertain to qualifications or competence of public contractors is not applicable to federal contractors." However, that court made no adjudication thereon and we conclude that such a judicial statement is not adverse to the Government's allegations of Montana officials' enforcement to the contrary.

We deem it unnecessary at this phase to decide

and do reserve deciding whether the above holdings in *Kiewit* are dispositive of any of the ultimate pretrial order Government-asserted issues of unequal treatment *to it* as distinguished from the individual contractor because we conclude that, at the least, some of the Government's presently asserted issues of violation of the Supremacy Clause remain viable and unfettered by any holding in *Kiewit*. Accordingly Montana's Motion for Summary Judgment should be denied.

GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

As stated above, we are concerned primarily at this phase with the Government's Supremacy Clause issues.

We find that the stipulated and agreed facts as submitted are not sufficient to support appropriate findings of fact and conclusions of law upon which to grant relief on any of the Supremacy Clause issues from Montana's application and enforcement of the Act; furthermore, the counter affidavits filed in support of some of the parties' respective contentions are in conflict and raise genuine issues as to material facts.

We conclude that there are genuine issues as to material facts involved, and the Government is not entitled to a judgment as a matter of law. Accordingly the Government's Motion for Summary Judgment should be denied.

We deem it judicially expedient that this cause be returned to further pretrial procedures for the development of an ultimate separate and distinct

delineation of the Government's specific constitutional claims in a pretrial order of issues entered either by stipulation or order.

DATED this 18th day of November, 1974.

James R. Browning

United States Circuit Judge

William G. East

United States District Judge

Russell E. Smith

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

STATE OF MONTANA, *et al.*

Defendants.

Filed 11/20/74
No. 1989
ORDER

Before: BROWNING, Circuit Judge, and EAST and SMITH, District Judges*

Based upon the decision made and entered herein contemporaneously herewith,

IT IS HEREBY ADJUDGED AND ORDERED that the several motions for summary judgment in favor of the plaintiff United States of America and defendants State of Montana, et al., respectively, are each denied.

DATED this 18th day of November, 1974.

James R. Browning

United States Circuit Judge
William G. East

United States District Judge
Russell E. Smith

United States District Judge

*Honorable James R. Browning, United States Circuit Judge for the Ninth Circuit, William G. East, Senior District Judge for the District of Oregon, and Russell E. Smith, Chief Judge for the

(Federal Title of Court and Cause)
STIPULATION OF COUNSEL
Filed 3/23/76

It is hereby Stipulated and Agreed by and among the parties, through their undersigned attorneys, that the attached Order (concerning the inapplicability of the regulatory provisions of the Montana Act to the United States and its contractors) be submitted to the Court for its approval, all attorneys and their respective clients having agreed and consented to the form, substance and the entry of same.

TERRY B. COSGROVE, Special
Assistant Attorney General
P.O. Box 1144
Helena, Montana 59601
Telephone: (406) 442-7450

ROBERT A. POORE, Special
Assistant Attorney General
4th Floor, Silver Bow Block
Butte, Montana 59701
Telephone: (406) 792-0488
Attorneys for Defendants,
State of Montana, et al.

JOHN J. McCARTHY, Chief
General Litigation Section
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

District of Montana, constituting a statutory three-judge district court by designation of Chief Judge H. Chambers for the Ninth Circuit, dated April 28, 1971.

CHARLES E. STRATTON
Trial Attorney-Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3056
OF COUNSEL
THOMAS A. OLSON
United States Attorney
Attorneys for the Plaintiff,
United States of America

PARTIAL JUDGMENT AND ORDER

Plaintiff, United States of America, having sought a declaratory judgment and a permanent injunction against the defendants from applying both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Public Contractor's Licensing, Regulation, and Gross Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, (hereinafter referred to as "Montana Act"), and the rules and regulations promulgated thereunder, against the United States, its contractors and its subcontractors and the Court having considered the entire record now on file in this action with respect to the licensing and regulatory provisions and the Court having been fully advised in the premises, the parties agreeing with respect to the licensing and regulatory provisions and the Court concluding that there is good cause therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the regulatory provisions of the Montana Act are not applicable to the United States, its contractors or its subcontractors by reason of the Federal Constitution, federal law and regulations, the United States

Supreme Court decision of *Miller* v *Arkansas*, 352 U.S. 187 (1956) and the *Montana Supreme Court* decision of *Peter Kiewit Sons' Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 F. 2d 102 (1973); nor are any federal contracts subject to state standards, review or supervision, nor do the defendants have any right or authority to suspend any federal contractor's license, nor can the defendants interfere with selection of bidders for the Federal Government.

DATED: March 18, 1976

Russell E. Smith
United States District Judge

(Federal Title of Court and Cause)

Filed 3/30/76

PRETRIAL ORDER

Comes now the plaintiff, United States of America, and the defendants, State of Montana, Department of Revenue of the State of Montana, and W.A.Groff, as Director of Revenue of and for the State of Montana, and his successors in office, by their undersigned attorneys, and in compliance with the local Rules for Pretrial Orders, respectfully submit the following Pretrial Order.

NATURE OF THE ACTION

This civil action, instituted by the United States of America (in April of 1971, with an amended complaint filed on February 12, 1975) seeks from this Court:

(1) A Declaratory Judgment that the Constitution and laws of the United States prohibit the imposition, application, or enforcement of the (a) taxing provisions and (b) the licensing and regulatory provisions of the Montana Public Contractor's Licensing, Regulation and Gross Receipts Tax Act, Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended (hereinafter referred to as the "Montana Act"), and the rules and regulations promulgated thereunder against the United States of America, its contractors, subcontractors, or those with whom it deals;

(2) A permanent injunction against the defendants and those in concert with them from imposing, applying, or enforcing both (a) the taxing provisions and (b) the licensing and regulatory provisions of the Montana Act against the United States of America, its contractors, subcontractors, or those with whom it deals, and

(3) A refund of taxes and license fees imposed on or

collected from the United States of America, its contractors, subcontractors, or those with whom it deals.

PARTIES TO THE ACTION

(1) The plaintiff, United States of America, is a corporate sovereign and body politic.

(2) The defendant State of Montana is a corporate sovereign and body politic, and is joined as a defendant in this action because the action involves an attack on the constitutionality of a Montana statute and its application.

(3) The defendant Department of Revenue of the State of Montana is the agency responsible for the administration and enforcement of tax laws, including the Montana Act and its Regulations (and is the defendant properly substituted for the State Board of Equalization).

(4) The defendant W.A. Groff is the Director of Revenue for the State of Montana, and is joined herein in his official capacity (and is the defendant properly substituted for the individual members of the State Board of Equalization).

STATEMENT OF JURISDICTION

The jurisdiction of this action is conferred upon this Court by Sections 1345 and 2201 of Title 28, United States Code, and a Three-Judge Court is properly invoked in this action pursuant to the provisions of Section 2281 of Title 28, U.S.C., because the plaintiff is attacking a Montana State statute and its application on the grounds of unconstitutionality.

PLEADINGS RAISING THE ISSUES

The issues involved herein are raised in the Amended Complaint and the Answer thereto.

UNDISPOSED OF MOTIONS

There are no Motions which have not been resolved by this Court, nor are there any other matters requiring action by this Court, other than the trial of this action.

AGREED FACTS

The following facts are true, require no proof, and have been agreed upon and stipulated to for the purposes of this action:

I. *GENERAL FACTS*

1. This action has been authorized and requested by a delegate of the Department of the Army, a Department of the plaintiff, United States of America, and is brought under the direction of the Attorney General of the United States.

2. An actual controversy has arisen and now exists between the United States of America and those with whom it contracts with on one hand and the defendants on the other hand, concerning their respective rights and duties.

3. In the performance of its governmental functions, plaintiff, United States of America, has entered into, prior to and since enactment of the Montana Act, and will enter into contracts with, and has employed and will employ, contractors and subcontractors to perform construction work in the State of Montana to erect, build, excavate, alter or repair buildings, structures, installations or facilities for itself, its agencies and instrumentalities, including its Department of the Army.

II. *Federal Law and Regulations Concerning Federal Contracting*

1. Congress, in the Armed Services Procurement Act of 1947 (Title 10, U.S.C., Section 2301, *et seq.*),

and in United States Government Procurement Regulations (32 C.F.R., Parts I-VIII and Parts IX-XXXIX, Sections 1.100, *et seq.*), provide for federal regulations or federal standards to determine and insure the fitness, qualifications, responsibility and reliability of persons, companies, or corporations performing construction work for the United States Govrnment, including those contractors or subcontractors under contract with the United States Government in Montana.

III. *The Regulatory Provisions of the Montana Act*

1. The language of the Montana Act, at all times pertinent hereto, has provided, and still provides that it is unlawful for a person to engage in the business or act in the capacity of a public contractor in Montana without having a Public Contractor's License, without paying a license fee of $10.00 to $200.00 and without paying gross receipts taxes measured by one percent (1%) of the value of all public construction contracts.

2. The Montana Act requires federal contractors, in order to (a) submit bids or proposals, (b) enter into contracts with, and (c) perform or continue their contractual obligations with the Federal Government, to obtain and maintain a Public Contractor's License under the Montana Act and meet standards or grounds to determine fitness and responsibility.

3. The Montana Act provides that the defendants have authority to suspend such Public Contractor's License (Section 84-3510 R.C.M., 1947 as amended).

4. Under the Montana Act and its Regulations a public contractor is defined as anyone who proposes and does perform work for a governmental agency, including the United States Government, State

Government, County Government, Municipal Government, School Districts, Municipal Corporations and Government Corporations.

5. Contractors performing construction contracts for private persons, partnerships, joint ventures, private corporations (including those listed on the New York and American Stock Exchanges) or other non-governmental groups are not required to obtain a Public Contractor's License or pay the one percent (1%) gross receipts tax.

IV. *Administrative Application of the Regulatory Provisions of the Act*

1. The Montana Act is administered by the Department of Revenue of the State of Montana.

2. By reason of the Montana Supreme Court decision of *Peter Kiewit Sons Co.* v. *State Board of Equalization*, 161 Mont. 140, 505 P. 2d 102 (1973), and the United States Supreme Court decision in *Miller* v. *Arkansas*, 352 U.S. 187 (1956), the defendants, administratively, have accepted the determination that the regulatory and supervision provisions of the Montana Act do not apply to contractors or subcontractors performing work for the Federal Government.

3. Administratively, contractors performing work for the Federal Government are required to obtain and maintain a Public Contractor's License under the Montana Act after a bid had been awarded to such contractor.

4. The Department of Revenue has never required a license of a contractor bidding a federal project.

5. Defendants have determined, administratively, by reason of the *Kiewit* and *Miller* decisions that such federal contractors are *not* subject to state standards

or grounds to determine fitness and responsibility.

6. The Department of Revenue has never interferred in any manner with the Federal Government's selection of its contractors on public works in Montana by reason of the regulatory provisions of the Act.

7. The license for contractors performing work for the Federal Government is an administrative measure to enforce payment of the one percent (1%) gross receipts tax (which is determined by the value of construction contracts performed for the Federal Government). (See MRC, §§42-2.14(2)-S1490(3)).

8. It has been determined by the defendants, administratively, on the basis of the *Kiewit* decision, that the State of Montana has no right or authority to suspend any federal contractor's license. (See MRC §§42-2.14(2)-S1490(4)).

9. The Department of Revenue has never supervised, halted or in any manner interferred with or impeded a contractor performing a federal contract in Montana.

10. After notice and hearing (Section 82-4204 R.C.M., 1947, as amended) and possible court review, the Department of Revenue could amend a rule pertinent to the administration of the Act subject in all events to Legislative review under Section 82-4203.1. R.C.M., 1947, as amended.

11. That the Department of Revenue as the administrative agency for the Act in question has adopted administrative rules pertinent to certain of the Federal Government's past complaints as to the Act and has provided:

(a) Obtaining a license is not a condition precedent for a contractor bidding on any contract for the construction of any federally owned or federally financed project.

(b) Upon being awarded such a contract, a contractor (including a federal contractor) shall obtain or possess a license at the applicable fee and thereafter pay the gross receipts tax herein specified.

(c) As to any contractor holding a contract for the construction of any federally owned or federally financed project, this Act is a revenue measure but nothing in the Act shall constitute authority to the Department of Revenue or any third person to supervise or control the selection of any contractor or review his qualifications, financial standing, past performance or the performance of his job.

12. As to the litigation in the state courts of Montana entitled Peter Kiewit & Sons, Inc. -vs- State Board of Equalization, et al., (citation in No. 1 above) the following obtain:

(a) The U.S. required that Peter Kiewit file the suit.
(b) The U.S. reviewed and approved the complaint.
(c) The U.S. paid Kiewit's attorneys' fees.
(d) The U.S. directed Kiewit's appealing from the District Court to the Supreme Court of Montana.
(e) The U.S. appeared as amicus curiae on appeal and submitted a brief and participated in oral argument before the Montana Supreme Court.
(f) The U.S. directed Kiewit to file a notice of appeal from the Supreme Court of Montana to the Supreme Court of the United States and paid the fees therefore.
(g) The real party in interest as concerns the plaintiff was the United States.

(h) The U.S. through its Solicitor General, Erwin N. Griswold, effectuated Kiewit's abandonment of its appeal to the U.S. Supreme Court.

13. That an issue litigated in said Kiewit case was the existence and validity for tax purposes of the classifications of public contractors -vs- private contractors.

V. *The Taxing Provisions of the Montana Act*

1. The taxing provisions of the Montana Act and its Regulations provide that a gross receipts tax must be paid at the present rate of one percent (1%) of all receipts derived from public construction contracts performed in the State of Montana, including those receipts derived from performing construction contracts for the Federal Government.

2. Under the Montana Act, in addition to the one percent (1%) gross receipts tax, there are three license fees; class C license—$10.00—applies to any single contract amount up to $25,000.00; class B license—license fee $100.00—applies to any single contract amount up to $50,000.00; class A license—license fee $200.00—contract amount unlimited.

3. The taxing provisions of the Montana Act and its Regulations also provide for certain refunds for personal property taxes paid to counties in Montana and credits for income and corporate income taxes paid to the State of Montana.

4. Such refunds and credits are available only up to the amount of the one percent (1%) gross receipts tax paid by the public contractor or public subcontractor.

5. The Act is in part a revenue enforcing measure as to collection of Montana personal property and income taxes.

6. The Taxing provisions of the Montana Act have

resulted in the one percent (1%) gross receipts tax being a revenue-raising measure of approximately one-half of one percent (1%) in addition to being a revenue-enforcing measure of approximately one-half of one percent (1%) (i.e., there is not a "wash-out" of the one percent (1%) gross receipts tax and that the net one percent (1%) gross receipts tax retained by the defendants equals approximately one-half of one percent (1%) after all available refunds and credits have been taken).

7. The taxing provisions of the Montana Act make no provision for refunds of personal property taxes paid in other states or provide no credits for income taxes or corporate income taxes paid to other states.

8. The application of the taxing provisions of the Montana Act is made effective by a determination of whether the awarding party is a public or private entity.

9. That under the provisions of the Montana Act, it is possible that a contractor who performs construction exclusively for the Federal Government within the State of Montana in one year will pay more Montana taxes (if, as is the case for many public contractors, the 1% gross receipts tax does not "wash-out") than a contractor who performs construction exclusively for a private entity, assuming identical circumstances exist for each contractor (i.e., same dollar value of work done, same amount of income and same amount of property located in State), but that it is never possible for a public contractor to pay less taxes, assuming identical circumstances exist.

10. Some of the contractors performing construction contracts for public entities in Montana also perform construction contracts for private parties in Montana.

11. The credit available to a public contractor under the Montana Act with respect to Montana State Corporation License Taxes or individual income taxes is based on the net income tax derived from the private and public contracts he performs in Montana.

12. The Act authorizes a contractor performing construction contracts in Montana for public entities to claim as refunds against (and up to but not exceeding) the one percent (1%) gross receipts tax paid with respect to public contracts in Montana the amount of personal property taxes assessed and paid to counties in Montana with respect to construction equipment or other personal property owned or used by the contractor involved in public construction projects, private construction projects or other private endeavors.

13. Amendments to the Montana Act (Chapter 180 of the Montana Session Laws approved on March 12, 1974) basically provided two things: The first, was that the total amount of the one percent (1%) gross receipts tax for any single contract (including subcontracts) can never be more than one percent (1%); and secondly, it provided for penalty for those prime contractors who failed to submit to the State an allocation record.

14. On contracts awarded by the Federal Government prior to June 30, 1975 (the effective date of the anti-pyramiding and withholding amendment to the Act), a federal prime construction contractor could be taxed at the rate of 1% of the proceeds of the prime contract, in addition, the one percent (1%) gross receipts tax would apply to the gross receipts of the subcontracts. This could result in a total cumulative gross tax in excess of 1% of the total contract price (i.e., there could have been a higher net tax).

15. Contractors performing construction contracts in Montana for a public entity are subject to the following three (3) Montana taxes:

a. Personal property taxes payable to counties in Montana.

b. Corporation license taxes, or income taxes, based on net income, payable to the State.

c. One percent gross receipts tax applicable to contract proceeds of the construction contracts awarded by the United States.

16. Contractors performing construction contracts in Montana for private parties-i.e., for parties other than the United States, the State of Montana or political subdivisions of the State of Montana (such as private corporations listed on the New York or American Stock Exchange) are subject to the following two (2) Montana taxes:

a. Personal property taxes payable to counties in Montana.

b. Corporation license taxes, or income taxes, based on net income, payable to the State.

17. That notwithstanding the provisions for refunds and credits in the act in question it has worked out to be a revenue producing measure or tax of approximately ½ of 1% and a revenue-enforcing measure of approximately ½ of 1% of the gross receipts of a contractor from any applicable public works contract.

18. Since the elimination of the pyramiding possibilities of the tax, it presently never exceeds 1% of the contractor's gross receipts from the public property owner and on average works out to about one-half of 1% because of refunds and credits.

19. That contractors based in-state and performing public contracts in Montana and contractors based

out-of-state and performing public contracts in Montana experience substantially similar tax impact under the Act in that in-state contractors have experienced a net tax of .44 of 1% tax and out-of-state contractors have experienced a net tax of .46 of 1% tax.

VI. *Pertinent Federal Contract Provisions*

1. That federal contracts are awarded after competitive bidding.

2. Prior to 1971, the Army Corps of Engineers contractually required its contractors in Montana not to take advantage of provisions for refunds and credits provided for in the Montana Act and since that date have required them to take advantage of all refunds and credits, including for back periods.

VII. *Highlights of the Audit of State Records*

1. Based on an audit of the Montana State Tax Records of the Montana Department of Revenue, Miscellaneous Tax Division, concerning the Montana public contractors one percent (1%) gross receipts tax (hereinafter referred to as "audit"), it is agreed by the parties that the tax balance retained by the State of Montana or yearly net tax balance paid on public contracts in Montana is approximately fifty percent of the tax collected by defendants or a rate of one-half of one percent (0.50%) of the total public contractor gross receipts.

2. Specifically, the audit reveals that the tax balance or net tax rate paid by out-of-State contractors is 0.46% and Montana based contractors pay a net rate of 0.44%.

VIII. *Tax Collection Under the Act*

1. The following one percent (1%) gross receipts taxes were collected by defendants under the Act (by year):

Year	Gross Receipts	Pers. Property Tax Refunds	Ind. Income Tax Credits	Corp. License Tax Credits	Net
1967	315,362.57	49,996.63	-0-	-0-	263,490.16
1968	1,163,620.21	374,074.63	21,434.18	36,231.13	725,353.57
1969	1,516,725.87	526,438.20	39,488.19	157,029.63	788,611.70
1970	1,855,370.37	681,092.19	54,528.95	192,294.95	941,014.91
1971	1,766,907.55	581,642.00	66,128.98	185,279.01	933,857.56
1972	2,042,845.23	712,204.66	73,828.62	221,721.32	1,035,090.63
1973	1,718,310.88	948,650.12	66,008.91	173,874.96	529,776.89
1974	1,840,594.62	427,203.84	96,381.09	423,294.86	893,714.83
July 7, 1975	620,141.15	617,621.64	122,352.16	332,640.31	-(452,472.96)
	*12,839,878.45	4,918,923.91	540,151.08	1,722,366.17	5,658,437.29

*Totals include $1,500,000.00 invested in Treasury Bills and Interest Earned.

2. The transfer to the general fund covering the years 1968, 1969, 1970, 1971, and 1972 was $2,836,982.56

3. There is an escrow fund in this case and the amount invested in Treasury Bills is $2,975,000.00 with an additional amount of interest of $257,124.72- (by order of this Federal Court).

CONTENTIONS OF THE PARTIES

The plaintiff contends that:

(1) The licensing and regulatory provisions of the Montana Act are erroneous, invalid and without legal force or effect because they are in conflict with the Constitution and laws of the United States of America in that they:

(a) Illegally violate the immunity of the Federal

Government and its instruments from State control in the performance of its functions.

(b) Illegally interfere with the Federal Government's power to select contractors and schedule construction, and are in conflict with federal procurement law and regulations.

(c) Illegally frustrate the federal policy of selecting the lowest possible bidder.

(d) Illegally constitute a review by the State of Montana over the federal determination of responsibility and fitness of its contractors and subcontractors.

(2) The taxing provisions of the Montana Act and Regulations are erroneous, invalid, and without legal force or effect because both the language and the operation of the Montana Act violate the Constitution and laws of the United States in that they:

(a) Illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business.

(b) Illegally force the Federal Government to pay more for its construction than does a private person, business, or corporation.

(c) Illegally discriminate against those with whom the United States does business.

(d) Illegally provide a system of refunds and credits that discriminate against an out-of-state contractor in favor of a Montana contractor and place a heavier tax burden on such out-of-state contractor.

(e) (The system of refunds and credits) illegally interferes with the Federal Government's free choice to choose its contractors and frustrates the policy of choosing the lowest bidder (in violation of

federal procurement law); and

(3) The one percent (1%) gross receipts tax was intended by the Montana legislature as a revenue-enforcing measure, was intended to "wash-out" and, accordingly, each year after all refunds and credits are taken by a public contractor or at the termination of each contract, the defendants must refund any excess gross receipts taxes collected under the Montana Act. See the 2nd Kiewit case, *Peter Kiewit Sons' Co.* v. *Department of Revenue*, 32 Rptr. 209, 531 P. 2d 1327, 1328 (Mont. Sp. Ct., 1975) wherein it was held that "it may be that Kiewit would be entitled to a refund or some other administrative remedy" from the Montana Department of Revenue of the excess of the one percent (1%) gross receipts tax over the offsets allowable under the Montana Act.

(4) The plaintiff is entitled to a refund of taxes, and license fees with interest, equal to all such amounts or sums as have been paid to defendants by plaintiff or its contractors or its subcontractors under the Montana Act in excess of all refunds and credits taken.

Defendants' Contentions:

1. (Immunity of Federal Government from State Regulation) There has been no interference whatsoever by the Defendants under the Act in question with the Federal Government's selection of its contractors, or in the letting of contracts to whomsoever it chooses, or with the performance of its contracts by its contractors.

(a) Factually the Federal Government cannot cite a single instance where the Department of Revenue in the administration of the Act has ever:

1. Required a license of a contractor as a condition precedent to bidding a federal contract.
2. Interfered in any manner with the Federal Government's selection of its contractors.
3. Reviewed in any manner the qualifications or lack of qualifications of any federal contractor or bidder.
4. Ever supervised or reviewed or interfered with a federal contractor's performance of his job with U.S.

(b) Legally the Federal Government cannot justifiably attack the Act as being unconstitutional as posing threats of interference by the Defendants with the Federal Government's selection and supervision etc. of its contractors. Even prior to the *Kiewit* decisions the specified concern of the Federal Government was wide of the mark because of the U.S. Supreme Court doctrine in *Miller* -va- *Arkansas*, 352 U.S. 187 (1956) to the effect that provisions of a state act upon which a state body or agency might attempt interference with the Federal Government's selection of its contractors were NOT APPLICABLE to federal contractors. Now the *Miller* doctrine has specifically been made applicable to this Act here in question. By stipulation this Montana Supreme Court's interpretation of the Act on this very point. In *Kiewit* -vs- *State Board of Equalization, et al.*, 161 Mont. 140, 505 P(2d) 102 the Montana Supreme Court applied the *Miller* rule and held any language of the Act which otherwise could be a predicate for state interference with Federal Government contractor

selection and management was INAPPLICABLE to the Federal Government. Finally in order to write the Supreme Court rule of *Kiewit* case into the language of the Act for administrative purposes and foreclose continuing attacks by the Federal Government, the following administrative rule controlling the Department of Revenue's administration of the Act was adopted:

42-2.14(2)-S1490 CONSTRUCTION OF ACT (3) Obtaining a license is not a condition precedent for a contractor bidding on any contract for the construction of any federally owned or federally financed project; upon being awarded such contract, a contractor shall obtain or possess a license at the applicable fee and thereafter pay the gross receipts tax herein specified.

(4) As to any contractor holding a contract for the construction of any federally owned federally financed project, this Act is a revenue measure but nothing herein shall constitute authority to the Department of Revenue or any third person through the Department (84-3510) to supervise or control the selection of any contractor or review his qualifications including financial standing or past performance records or the manner of performance of his job.

MAC42-2.14(2)-S1490

By virtue of each and all of the foregoing the Federal Government is not justified in endeavoring to challenge the constitutionality of the Act on the ground that it

interfers with its selection, supervision and management of its contractors and violates Federal immunity from state control.

No Tax or Economic Discrimination Against the United States:

2. The act imposes a 1% tax which has worked out by virtue of credits and refunds to be actually a tax of ½ of 1%.

Such tax is levied on the contractor—not on the United States. The United States is not required to pay such tax or to withhold it. Any direct involvement of the United States with the tax arises by its own election in its contractual relations with its contractors. Prior to 1971 the Federal Government involved itself contractually with the tax by requiring its contractors not to take advantage of refunds and credits. Since 1971 the Federal Government has *required* its contractors to include the tax in their bid thereby insuring economic impact on itself. Such direct involvement by the Federal Government in the tax aspects of the Act arises voluntarily and by election and not by legislative provision under the Act. There is no direct tax upon the Federal Government!

If there is economic impact on the Federal Government it is:

(a) Indirect

(b) Not substantial within the U.S. Supreme Court doctrines of *James* -vs- *Dravo Contracting Co.*, 302 U.S. 134; *Leslie Miller* -vs- *Arkansas*, 352 U.S. 187; *Silas Mason* -vs- *State Tax Commission*, 302 U.S. 186.

(c) Imposed equally and identically upon all public contractors such that the State of Montana

(and its subdivisions) are treated exactly the same as the Federal Government.

(d) In no sense (either through refunds and credits or otherwise) discriminates against in-state and out-of-state contractors. The Federal Government's own audit shows in-state effective tax of .44 of 1% and out-of-state tax of .46 of 1%.

So by virtue of the foregoing the Act does not violate the Supremacy Clause (Article VI, Clause, 2, U.S. Constitution); it does not violate the equal protection clause of the 14th Amendment; it does not violate the Commerce Clause Article I, Section 8.

3. The Classification for Tax Purposes between Public Projects and Private Projects—i.e., Between Contractors performing Public Jobs (Public Contractors) and Contractors performing Private Jobs (Private Contractors) is based upon reasonable differences between the two classes and is not arbitrary or capricious.

The present deposition and expected testimony of architect Philip C. Hauck will establish these differences (if the Plaintiff is not estopped as a matter of law from disputing the validity of the classification; see Defendants' contention "5." below.)

4. Under the doctrine of *England* -vs- *Medical Examiners*, 375 U.S. 411 (1964) the Federal Government elected to litigate its challenges to the constitutionality of the Act fully in the State Courts of Montana and is barred from relitigating the same again.

5. The Federal Government is Collaterally Estopped from relitigating the following issues which it as the acknowledged real party in interest in the state court suit of *Kiewit* -vs- *State Board* caused to be

raised and decided:

(a) The reasonableness and validity of the classification for the tax purposes between public contracts and private contracts.

(b) The inapplicability of the Act as to the Federal Government's selection or control of its contractors.

(c) That the tax is not directly on the United States and that any indirect economic impact is not substantial within the concepts of the *Dravo* case.

The United States as real party in interest in the *Kiewit* case caused the foregoing issues to be litigated and decided by the Supreme Court of the State of Montana. A challenge to the resolution made by that Court adverse to Plaintiff's contentions was limited to the appeal to the U.S. Supreme Court which the Federal Government initiated and then abandoned. And the Plaintiff is now collaterally estopped from relitigating those issues in this suit.

LAW PROBLEMS

There are no law problems other than the contentions of the parties.

PERTINENT STATUTES AND REGULATIONS

1. United States Constitution, Article VI, Clause 2 (Supremacy Clause).
2. United States Constitution, 14th Amendment.
3. United States Constitution, Article I, Section 8, Clause 2 (Commerce Clause).
4. Title 10, Section 2301, *et seq.*, United States Code.
5. The Armed Services Procurement Regulations (A.S.P.R.'s), Title 32, Code of Federal

Regulations, Parts I-VIII and Parts IX-XXXIX.

6. Chapter 35 of Title 84, Revised Codes of Montana, 1947, as amended, and the Rules and Regulations promulgated thereunder (Chapter 195 of the Session Laws of Montana, approved February 28, 1967, effective July 1, 1967, an Act providing for additional public contractors' license fees for all public construction work in Montana, amending Sections 84-3501 R.C.M. 1947,*et seq.*) (Chapter No. 180 Montana Session Laws of 1947, approved March 12, 1947; Anti-Pyramiding amendment).
7. Montana Administrative Code, Sec. 42-2.14 (2)-S1480, *et seq.*

EXHIBITS

The parties agree to the authenticity of the following exhibits and they are admitted into evidence with no objections:

The following are the plaintiff's exhibits:

1. State of Montana, Department of Revenue, Contract Award Report.
2. State of Montana, Department of Revenue, Experience Questionnaire, Financial Statement and Application for Public Contractor's License (authenticity only) (relevancy challenged) by defendants.
3. State of Montana, Department of Revenue, Gross Receipts Withholding Report.
4. State of Montana, Department Of Revenue, Public Contractor's Accounting Sheets and Cards.
5. State of Montana, Department of Revenue, Application for Refund of Contractors' Gross Receipts tax.

6. Montana Corporation License Tax Return.
7. Montana Individual Income Tax Return.
8. United States Department of the Army, Seattle District Corps of Engineers, Construction Contract with Pacific Ventures, Inc., Bellevue, Washington, Contract No. DACW 67-74-C-0072, Modification No. P00006, dated April 22, 1975.
9. Breakdown sheet, R.A. Heintz Contracts with United States Army Corps of Engineers, Libby Dam Project, Contract No. DACW 67-72-C-0017 and Contract No. DACW 67-69-C-0039. And Contract Nos. DACW 67-71-C-0003 and DAWC 67-67-C-0097.
10. December 15, 1975 and November 19, 1975 Audit Report of John E. Templeton, Division Auditor, North Pacific Division, United States Army Corps of Engineers and Norman K. Jensen, Auditor in Charge, Omaha Resident Audit Office, United States Army Corps of Engineers and any supplements thereto.
11. Breakdown sheet of John E. Templeton to illustrate effects of one percent Montana Gross Receipts Tax.
12. Construction Contract, United States Army Corps of Engineers and Sletten Construction Company, Great Falls, Montana, Contract No. DACW 67-74-C-9001, Modification No. P00001.
13. Construction Contracts and modifications of contractors testifying.
14. Plaintiff's Exhibit illustrating differences between public bid and private bid in State of Montana. (Attached to Deposition of William R. Lowe).

The following are the defendants' exhibits:

The United States has outlined its list of exhibits which shall not be duplicated here in whole or in part; consequently the only exhibit of the Defendants is the transcript of the Federal Government's participation in the hearing on March 24, 1975 directed at adopting regulations governing the Department of Revenue's administration of the Act.

LIST OF WITNESSES

The plaintiff expects to call the following witnesses at trial:

1. John E. Templeton, Auditor in Charge, United States Army Corps of Engineers, North Pacific Division, Portland, Oregon.
2. Norman K. Jensen, Auditor in Charge, Omaha Resident Audit Office, United States Corps of Engineers, Omaha, Nebraska.
3. Herbert B. Hallock, Comptroller, R.A. Heintz Construction Company, 2035 N.E. Columbia Boulevard, Post Office Box 11005, Portland, Oregon 97211.
4. Leo Werre, Certified Public Accountant, for Pacific Ventures, Inc., Portland, Oregon.
5. Merrill A. Moran, Secretary-Treasurer, Sletten Construction Company, Great Falls, Montana.
6. James Madison, Administrator, Miscellaneous Tax Division, Department of Revenue of the State of Montana.
7. Peter Van Parys, Engineer, U.S.Army Corps of Engineers, Washington, D.C.

The Defendants expect to call the following witnesses:

1. James Madison, Department Administrative Head.

2. William Lowe, Contractor.
3. Robert B. McIntyre, Contractor.
4. Philip Hauck, Architect.
5. Philip E. Maronek, Contractor.

ESTIMATED TRIAL TIME

It is estimated that the trial of this case may take 3-4 days.

REQUESTED BRIEFING SCHEDULE

It is requested that the following briefing schedule be adopted by the Court:

1. Trial briefs will be mailed simultaneously by the parties by March 23, 1976.

2. The plaintiff's memorandum of points and authorities will be submitted within 60 days from the date of trial.

3. The defendants' answer brief will be submitted within 45 days thereafter.

4. The plaintiff's reply brief will be submitted within 30 days thereafter.

Respectfully submitted,

TERRY B. COSGROVE, Special
Assistant Attorney General
P.O. Box 1144
Helena, Montana 59601
Telephone: (406) 442-7450

ROBERT A. POORE, Special
Assistant Attorney General
Fourth Floor, Silver Bow Block
Butte, Montana 59701
Telephone: (406) 792-0488
By: Terry B. Cosgrove
Attorneys for the defendants,
State of Montana, et al.

THOMAS A. OLSON
United States Attorney
By: Charles E. Stratton
Trial Attorney-Tax Division
General Litigation Section
U.S.Department of Justice
Washington, D.C. 20530
Telephone: (202)739-3506
Attorneys for the plaintiff,
United States of America.

PETER KIEWIT SONS' CO, A Corporation, Plaintiff and Appellant, v. STATE BOARD OF EQUALIZATION of The State of Montana et al., Defendants and Respondents.

No. 12199.
Submitted Nov. 27, 1972.
Decided Jan. 10, 1973.
Rehearing Denied Jan. 29, 1973.
505 P.2d 102.

LICENSES—TAXATION—STATES—CONSTITUTIONAL LAW.

1. **Licenses.**
   Public Contractors' License Act, which requires a 1% tax on all receipts from public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government, and which gives to contractors a dollar for dollar credit on personal property taxes from fund created by payment of tax, was intended as an incentive to public contractors to declare their items of personal property for taxation and as encouragement to contractors to more fairly allocate out-of-state home office overhead expenses, in part at least, to state. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, 84-4901 et seq.

2. **Licenses.**
   Legislature may impose a license tax on certain occupations and not on others, but arbitrary and unreasonable classifications are not permitted.

3. **Taxation.**
The state has the duty and the authority to levy taxes. Const. art. 12, § 11.

4. **Taxation.**
The law does not require that all contractors be taxed in an identical manner but that members of a class be given the same tax treatment. Const. art. 12, § 11.

5. **Taxation.**
Fact that burden imposed on one member of a class may be more onerous than that imposed on a member of another class does not violate constitutional safeguards if classification is justified. Const. art. 12, §11.

6. **Taxation.**
Legislature may make classifications for tax purposes on different industries, and, as long as classification is reasonable, it will be upheld. Const. art. 12, § 11.

7. **Licenses.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within the state, including government is not unconstitutional as being discriminatory in its distinction between public and private contractors, even though private contractors may take many of same precautions required by state or federal government. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, et seq.; Const. art. 12, § 11.

8. **Taxation.**
States have great latitude and freedom to effect tax classifications as long as they are not arbitrary or capricious. Const. art. 12, § 11.

9. **Licenses.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government is not unconstitutional as being discriminatory against federal government where federal government is treated in same manner as state treats itself and its subdivisions or municipalities. R.C.M. 1947, §§84-1501 et seq., 84-3514, 84-4901 et seq.; Const. art. 12, § 11.

10. **States.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state including construction done by United States government is not violative of supremacy clause, notwithstanding claim that it results in interference with federal government functions and is in conflict with federal procurement legislation, inasmuch as provisions of Act pertaining to qualifications or competence of public contractors are not applicable to federal contractors. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, 84-4901 et seq.

11. **Licenses.**
Provisions of Public Contractors' License Act which pertain to qualifications or competence of public contractors is not applicable to federal contractors, but qualifications test remains in force in regard to contractors working on state contracts, and gross receipts tax will remain in force as to all public contractors performing work

in state. R.C.M. 1947, §§ 84-1501 et seq., 84-3514, 84-4901 et seq.

12. **Licenses.**
Although a state cannot tax the federal government, it can tax an independent contractor for privilege of doing work within state.

13. **Licenses.**
Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government is not aimed at nor does it impede federal government in performance of its functions and does not violate immunity of federal government from taxation or economic impact of taxation. R.C.M. 1947, §§ 84-151 et seq., 84-3514, 84-4901 et seq.

Appeal from the District Court of Lewis and Clark County.

First Judicial District.

Hon. Victor H. Fall, Judge presiding.

See **C.J.S.**, Licenses, § 6.

Suit wherein corporate taxpayer challenged constitutionality of Public Contractors' License Act and sought to obtain refund of all taxes and fees remitted to state under Act. The District Court entered judgment in favor of Board of Equalization, and taxpayer appealed. The Supreme Court held that Public Contractors' License Act requiring a 1% tax on all receipts of public contractors in state, including both resident and nonresident contractors, covering all public works within state, including construction done by United States government is not unconsti-

tutional as discriminatory in its distinction between public and private contractors, and it is not unconstitutional as discriminatory against federal government, nor is it violative of supremacy clause, notwithstanding claim that it results in interference with federal government functions and is in conflict with federal procurement legislation, inasmuch as provisions of Act pertaining to qualifications or competence of public contractors do not apply to federal contractors.

Affirmed.

Garlinton, Lohn & Robinson, Sherman V. Lohn and Lawrence F. Daly, argued, Missoula, for plaintiff and appellant.

Scott P. Crampton and Gilbert E. Andrews, Jr., Bruce I. Kogan, argued, Washington, D.C., amicus curiae.

Poore, McKenzie & Roth, Robert A. Poore, argued, Butte, Jene Bell appeared, Helena, for defendants and respondents.

MR. JUSTICE CASTLES delivered the Opinion of the Court.

This is an appeal from a judgment of the district court of the first judicial district, county of Lewis and Clark.

In February and March 1971, plaintiff Peter Kiewit Sons' Co. paid a total of $8,726.47 as gross receipts tax payments in compliance with Chapter 35, Title 84, R.C.M. 1947. At the same time, plaintiff also filed letters of protest with defendant State Board of Equalization challenging the validity of the public contractors' license act and demanded refund of the payments. Within sixty days plaintiff proceeded to bring an action in the district court seeking to have Chapter 35, Title 84, R.C.M. 1947, declared in

violation of the laws and Constitution of the state of Montana and the Constitution of the United States, to obtain refund of all taxes and fees remitted to the state of Montana under the chapter in question.

The district court, sitting without a jury, found the provisions of Chapter 35, Title 84, R.C.M. 1847, did not violate the laws or Constitution of Montana nor the Constitution of the United States. Judgment was entered for defendant. Plaintiff filed motions to amend the findings of fact and conclusions of law and for a new trial, which were denied by the trial court. From the judgment and order denying those motions, plaintiff appeals.

In addition to briefs and argument in this Court by counsel for the parties, a brief and oral argument was presented by the United States government as amicus curiae in support of plaintiff's position.

We feel at this point that a brief history of the Act in question would be helpful. The initial version of what became Chapter 35, Title 84, R.C.M.1947, was passed by the Montana legislature in 1935. It required the licensing by the state of contractors dealing with the state or any of its political subdivisions; federal contractors were excluded from the Act.

In March 1965, in an attempt to ensure the payment of state and local taxes by contractors working in the state, Chapter 277, Laws 1965, was passed by the legislature. The problem arose because some contractors working in the state did not report all of their equipment to county tax assessors, who were attempting to impose county property tax on those contractors. Also, some contractors working in the state would not file corporate or personal income tax returns which would have fairly reflected their business profits from within the state.

Chapter 277, Laws 1965, imposed a 1% tax upon gross receipts of all nonresident public contractors operating within the state. In April 1965, the constitutionality of Chapter 277, Laws of 1965, was raised to this Court and the Court found it to be unreasonable discrimination and ruled it unconstitutional. State ex rel. Schulz-Lindsay v. Board of Equalization, 145 Mont. 380, 403 P.2d 635.

In 1967, the Montana legislature again attempted to work out a solution to the problem of contractors not paying their taxes. That legislature enacted a revenue enforcing measure designed to operate hand in hand with Montana's long-standing personal property tax and income tax, to ensure more effective tax collection and reduce tax avoidance. It then passed an amendment to the 1935 licensing act which required a 1% tax upon all receipts of public contractors in the state, including both resident and nonresident contractors, covering all public works within the state including construction done by the United States government.

The revenue enforcing measure was enacted in an attempt to require some of the contractors working in the state to meet their tax responsibilities. The mechanics of the measure are best understood by taking, as an example, the Kiewit contract for part of the Montana Libby Dam project. The contract was given to Kiewit because it was the lowest responsible bidder. The contractor then entered on the performance of its contract and as the work progressed it received payments from the landowner. It paid 1% of such receipts to the State Board of Equalization. In such manner Kiewit has paid or will pay 1% of approximately 6.4 million dollars or about $64,000 to the State Board of Equalization.

This fund is held to the credit of Kiewit on an accounting system adopted by the State Board. The Act operates in the nature of a withholding or prepayment program for Montana property and income taxes. In this case, Kiewit has sufficient items of heavy equipment working on the job at Libby to incur and pay a personal property tax of $35,803.22. Kiewit is entitled to a dollar for dollar credit and actual refund for such personal property taxes from its fund created with the State Board in 1971 by its payment of the 1% gross receipts tax. So any time in 1971, after having paid the personal property taxes Kiewit could, upon showing proof of such payments of personal property taxes, receive a refund of the payments out of the 1% gross receipts tax. Not only could Kiewit obtain refunds of personal property taxes paid in Lincoln County at the job site, but could also have the same benefits for any personal property taxes paid by it that year, anywhere in Montana.

Payments on the job and the corollary 1% tax thereon may come more rapidly than personal property taxes are due or may exceed the amount of such taxes. In that event, the remainder of the 1% fund to the contractor's credit at the State Board may be used to pay, dollar for dollar, the contractor's income taxes. If refunds of the personal property taxes have not consumed the 1% gross receipts tax payments to the State Board, the contractor can take dollar for dollar credit directly against his tax for the balance of gross receipts tax still remaining to his credit at the State Board.

(1) Where there is heavy equipment subject to property tax and/or net income tax on a job and the taxpayer claims the refunds or credits, the gross receipts tax washes itself out. The Act, as can be seen from the

credits procedure, was intended as an incentive to public contractors to declare their items of personal property for taxation. It also encourages contractors to more fairly allocate out-of-state home office overhead expenses, in part at least, to Montana.

It is true that the Act in practice to date has not resulted in a total washout of the 1% gross receipts payments. It does appear that one of the reasons for this failure is that the federal government has inserted a clause in some of the federal contracts which prohibits a contractor from taking the refunds and credits available to him. Such a clause was in the contract Kiewit had with the federal government Clause 58 (f) of that contract reads:

"The Act (R.C.M. 1947, sec. 84-3514) allows the license fee based on gross receipts to be used as a credit on: (1) the Contractor's corporation license tax (R.C.M. 1947, Title 84, Chapter 15) or on Contractor's income tax (R.C.M. 1947, Title 84, Chapter 49), depending upon the type of tax the Contractor (or sub-contractor) is required to pay under the laws of the State of Montana; and (2) personal property taxes paid in Montana on personal property of the Contractor (or subcontractor) which is used in the business of the Contractor and is located within the State. *The Contractor, and, in turn, the subcontractors will not take advantage of these credits.*" (Emphasis added).

This prohibition by the federal government is of necessity part of the reason there is a surplus of the revenue of the gross receipts tax.

As for other reasons why the Act is not a total wash item, the district court, upon hearing the evidence, found that some of the contractors were not aware of the credit available to them and some were simply

indifferent to the use of their credits. In its finding of fact No. 17, the district court said:

"***That the present residue of tax with the State Board or State of Montana is not fairly representative of how the tax is likely to operate in future years."

There has been nothing presented to this Court on appeal which would change the finding of the district court and it is clear that this Act is intended to operate as a revenue enforcing measure.

Appellant's principal argument is that a tax which is placed solely on public contractors is discriminatory. It maintains the only difference between public contractors and private contractors is the status of the party for whom the contractor is working. Such a difference, in appellant's view, is not sufficient to justify the imposition of the tax.

(2) Since that was the same point raised in *Schulz-Lindsay*, a review of that decision will give us a view of Montana law on the issue of tax discrimination. There, we stated that the legislature may impose a license tax on certain occupations and not on others, as long as "arbitrary and unreasonable classifications" are not permitted. *Schulz-Lindsay p. 398, 403 P.2d, p. 640.*

In *Schulz-Lindsay* at p. 390, 403 P.2d at p. 640, the Court citing State v. Sunburst Refining Co., 73 Mont. 68, 235 P. 428, stated that in making such classifications:

"'Equal protection of the law is seldom, if ever, obtained; and because of the very frailty of human agencies, the authorities all recognize the right of the legislative branch of government to make reasonable classifications of subjects, for property or occupation taxes***and if the classification is reasonable, and if all of the subjects within a given class are accorded

the same treatment, the legislation cannot be said to deny to anyone within such class the equal protection of the law, even though the burden imposed upon him may be more onerous than that imposed upon a member of another class. (citing cases) *But to justify such discriminatory legislation, and avoid the condemnation of the Fourteenth Amendment to the federal Constitution, the classification must be reasonable—that is, must be based upon substantial distinctions which really make one class different from another.* (Citing case) (Emphasis ours.)'"

Later in the same opinion at p. 392, 403 P.2d at p. 641, the Court said:

"'The constitutional safeguard against unjust discrimination in legislation of this type is well defined by the decisions everywhere, and that is, *that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* Mills v. State Board of Equalization, 97 Mont. 13, 31, 33 P.2d 563.' (Emphasis ours.)"

(3.) The state has the duty and authority to levy taxes. Such is required in the Constitution; however, Section 11 of Art.XII of the Montana Constitution requires that such taxes shall also be uniform upon the class within the taxing authority. Interpreting that section of the Montana Constitution in Schultx-Lindsay at p. 393, 403 P.2d at p. 641, this Court said:

"'"Or, stating the principle of sections 1 and 11 in different form, the mandatory injunction to the Legislature is that it shall prescribe such uniform mode of *assessment* as shall secure a just valuation of all taxable property, that all taxes shall be levied and

collected by general laws and for public purposes only, and that *they shall be uniform upon the same class property within the territorial limits of the authority levying the tax. This is the rule of uniformity declared by Constitution, if we are able to determine the intention of its framers aright.*"

"'*We think it will be admitted that any tax against the same kind of property used for identical purposes is not uniform when a different valuation and a different rate is applied to two distinct taxpayers, separately distinguishable only in name,* and the tax being imposed by the same taxing district. We further believe it will be admitted that such disregard of the uniform clause of sections 1 and 11 of Article XII, supra, constitutes clear discrimination.'" (Emphasis theirs).

(4) In *Shultz-Lindsay* it is clear the state had discriminated against nonresident taxpayers doing public work. All contractors doing public work were not treated in a fair manner as there was no basis to make the distinction between resident and nonresident public contractors. That is not the situation here, because all public contractors are not treated equally, all are taxed on 1% of their gross receipts. There is a class of taxpayers, public contractors, and that class comes under the special tax enforcing measure of the Act. This situation is clearly distinguishable from the *Schultz-Lindsay* situation. We do not read the law to require all contractors to be taxed in an identical manner, only that members of a class be given the same tax treatment.

(5) It is true that the private contractor does not have the same revenue enforcing measure that the public contractor has, but, "even though the burden imposed upon him may be more onerous than that

imposed upon a member of another class", that does not violate the constitutional safeguards if the classification is justified. *Schultz-Lindsay,* p. 390, 403 P.2d p. 640.

(6) Montana case law has established that the legislature may make classifications for tax purposes on different industries in Montana. As long as the classification is reasonable, it will be upheld. Quong Wing v. Kirkendall, 39 Mont. 64, 101 P. 250; Anaconda Copper Mining Co. v. Junod, 71 Mont. 132, 277 P. 1001; Hale v. County Treasurer of Mineral Co., 82 Mont. 98, 265 P. 6; Norum v. Ohio Oil Co., 83 Mont. 353, 272 P. 534.

(7) Our question now is—is it reasonable to make a classification for tax purposes for contractors doing public work and not for contractors doing private work?

At trial, respondent State Board stressed the differences between the two types of contractors in this manner:

1. A public work is intended for the use of the public and if the work is inadequate in some particular way, this could expose and would expose some part of the public at large to danger, inconvenience, or injustice. That of course would not be always true in the case of a private contractor.

2. Public contractors must be experienced, they must establish their qualifications to the state or federal government. However, private property owners could engage a licensed or unlicensed contractor or an experienced or inexperienced one.

3. Public contractors invariably must provide a bond. Private works require bonds only at the election of the owner.

4. Public works normally would involve elaborate,

professionally drawn plans and specifications. They would also include mandatory supervision or inspection. Private works would have such inspection and/or supervision at the option of the owner.

Appellant argues that all of the above mentioned areas are also normally included in any private contracting job in the state; therefore, there is no justification of the classification. We do not agree. It may be true that private contractors will take many of the same percautions required by the state or federal government, but the point is that when dealing with public works these precautions *must* be taken. People of the state have a right to make sure that a building built with their money is safe and that the contractor is qualified in all respects. For this reason it is clear how the classification can be made—for the protection of the public good. The duty of a contractor is to the person paying the bill, in the case of a public contractor it is the taxpayer. In order to ensure that the duty is met, the state can and does deal with public contractors in a different way than private contractors. Because of this basic difference, there is no reason why they cannot be taxed in a different manner, as long as all in the same class are treated equally.

In Quong Wing v. Kirkendall, 39 Mont. 64, 69, 101 P. 250, 251, the Court said:

"The Constitution gives the power to impose a license tax upon persons doing business in this state.***The Legislature is not required to tax all occupations equally or uniformly.***'If the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law "operates equally and uniformly upon all persons in similar circumstances.'"'

What could be more uniform than requiring all public contractors to pay this tax, all members of the class are treated alike.

(8 The United States Supreme Court has given the states great latitude and freedom to effect tax classifications, as long as they are not arbitrary or capricious. In Brown-Forman Co. v. Kentucky, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883, 887, the state of Kentucky levied a 1¼ cent per gallon tax on every corporation or individual engaged in the business of compounding, rectifying, adulterating or blending distilled spirits. Corporate or individual distillers of pure or unadulterated spirits were not so taxed. A producer of blended spirits brought an action stating the tax was discriminatory. In upholding the state's power to tax, the United States Supreme Court said:

"A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

We believe that a distinction between public and private contractors is not arbitrary or capricious and following the reasoning of the United States Supreme Court—the state of Montana has the power to make such a distinction and the statute in question is not unconstitutional

The second half of the discrimination question raised by appellant is that this tax discriminates against the federal government. It urges that the state of Montana is required to treat the United

States and other public bodies as well as it treats private nongovernmental parties. Appellant contends granting a preferred tax status to a substantial number of taxpayers, contractors performing work for private owners, and failing to grant a comparable status to construction contractors of the United States, constitutes unconstitutional discrimination agaist the United States and those who whom it deals.

In response to this argument, respondent Board contends, basically, that since the state of Montana is treated in tax matters with public contractors the same as the federal government is treated, there is no discrimination. Counsel for both parties cite in support Phillips Chemical Co. v. Dumas School District, 361 U.S. 376, 80 S. Ct. 474, 4 L.Ed. 2d 384, 391, and Moses Lake Homes v. Grant County, 365 U.S. 744, 81 S. Ct. 870, 6 L.Ed2d 66.

In *Phillips Chemical Co.*, the state of Texas levied a tax on leases where the United States government was the lessor, but did not provide for such a tax where the state of Texas was the lessor. The court found this type of taxation was discriminating against the federal government and therefore invalid. The court stated:

"****it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself."

In *Moses Lake Homes,* the state of Washington sought to tax leasehold interests wherein the federal government was the lessor at a higher rate than it taxed leasehold interests where the state of Washington was the lessor. The court stated that *Moses Lake Homes* was indistinguishable from *Phillips Chemical Co.* and ruled that a tax which

discriminated against the federal government was invalid.

(9) Here, we do not believe that the state of Montana has discriminated against the federal government. The federal government is being treated in the same manner as the state of Montana treats itself and its subdivisions or municipalities. The only discrimination the federal government can claim is that private contractors are not paying the same tax as public contracators. However, according to case law, all the United States Supreme Court has required is that the state does not give itself special treatment over that received by the federal government. The Act involved here treats the federal government in the same manner as it treats those who deal with any part of the state government. The second half of the discrimination question is denied.

(10) Appellant and amicus curiae argue that the Act is invalid because it results in interference with federal government functions and is in conflict with federal procurement legislation. Therefore, it violates the supremacy clause of the United States Constitution. Their basis for such argument is that our licensing statutes gives Montana the power of review as to whether or not a contractor can operate within Montana, even if he has already been awarded a public contract.

All parties cite Miller v. Arkansas, 352 U.S. 187, 77 S. Ct. 257,1 L.Ed 2d 231. There, Arkansas had a licensing statute similar to the one in question here which allowed the state to review contractors who had been awarded public contracts, including federal contracts, as to their fitness to perform the work. Under the authority of that statute, the state brought an action against a contractor awarded a federal

contract because that contractor was not licensed in Arkansas. In reviewing the case, the United States Supreme Court held simply that the statute was not applicable to contractors working on federal government contracts. We do not find the United Sstates Supreme Court stated that such Arkansas statute was unconstitutional per se. If only stated that the state does not have the power to review federal contractors as to their fitness.

11) Here, we hold, as did the district court, that the provisions of the Act which pertain to qualifications or competence of public contractors is not applicable to federal contractors. The qualification test of the Act remains in force in regard to contraactors working on state contracts, and the gross receipts tax will remain in force as to all public contractors performing work in Montana.

(12) Finally, it is argued that this Act violates the immunity of the federal government from taxation or the economic impact of taxation. It has been established that a state cannot tax the federal government. But, the state can tax an independent contractor for the privilege of doing work within the state. The United States Supreme Court decided that point in James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 166, 173.

In *James,* the plaintiff was a contractor domiciled in Pennsylvania. As an independent contractor it had four construction contracts with the federal government for the building of locks and dams in the Kanawha River and Ohio River within the state of West Virginia. West Virginia had a statute known as the gross sales and income tax law which provided for annual and privilege taxes on contractors doing business in the state of West Virginia. The tax was

2% of the gross income of the contractor within the state. Such tax was in addition to all other state taxes. The court was faced with this problem: "Is the tax invalid upon the ground that it lays a direct burden upon the federal government?" To that question the court answered:

"***the West Virginia tax *** does not interfere in any substantial way with the performance of the federal functions and is a valid exaction."

The court then went on to point out that the economic impact upon the federal government must be direct and substantial and that the 2% gross tax was neither direct nor substantial. For a further discussion of this rationale, see Silas Mason Co. v. State Tax Commission, 188 Wash. 98, 61 P.2d 1269.

(13) Following the reasoning of the United States Supreme Court, we find the tax involved here was not aimed at nor does it impede the federal government in performing its functions. If there is any burden on the federal government, it is indirect and not substantial. The tax is valid.

The judgment of the district court is affirmed.

MR. CHIEF JUSTICE JAMES T. HARRISON, and MR. JUSTICES HASWELL, DALY and JOHN C. HARRISON concur.

PETER KIEWIT SONS' CO., A Corporation,
Plaintiff and Appellant,
v.
DEPARTMENT OF REVENUE et al.,
Defendants and Respondents.
No. 12754.
Supreme Court of Montana.
Submitted Sept. 11, 1974.
Decided Feb. 21, 1975.

Public contractor brought action against Department of Revenue and Tax Appeal Board challenging constitutionality of public contractors' gross receipts tax. The District Court, Lewis and Clark County, Peter G. Meloy, J., granted summary judgment in favor of Department of Revenue and Tax Appeal Board and public contractor appealed. The Supreme Court, Castles, J., held that problems in administration of a tax did not make the statute creating it unconstitutional; that constitutionality of the statute was not contingent on refunds of personal property taxes and contractors' income taxes offsetting the gross receipts tax; and that prior decision of the Supreme Court involving the same challenge to the same statute by the same public contractor was res judicata.

Affirmed.

1. Licenses 7(1)

Any problems arising out of method by which Department of Revenue currently enforced entire public contractors' gross receipts tax law with respect to both public and private contractors was strictly an administrative problem and did not approach a constitutional problem such as would invalidate the statute which created the tax.
R.C.M.1947,§84—3501 et seq.

2. Licenses 5

Any interference with federal highway administration procurement activities caused by enforcement by Department of Revenue of public contractors' gross receipts tax did not make the tax law unconstitutional. R.C.M.1947, § 84—3501 et seq.

3. Licenses 7(1)

Although allegation that state collected money through the public contractors' gross receipts tax in excess of credits and refunds and was thus using the law as a revenue raising measure rather than a revenue enforcing measure might give public contractor a right to refund or some other administrative remedy, it did not provide basis for declaring the law unconstitutional. R.C.M.1947, § 84—3501 et seq.

4. Courts 107

State Supreme Court decision which upheld constitutionality of public contractors' gross receipts tax did not make the constitutionality of the statute contingent upon its being enforced in such a manner that refunds of personal property taxes and contractors' income taxes offset the 1% gross receipts tax. R.C.M.1947, § 84—3501 et seq.

5. Judgment 585(2)

Decision of state Supreme Court which upheld public contractors' gross receipts tax in challenge brought by public contractor against State Board of Equalization was res judicata to constitutional challenge brought by the same public contractor against the Tax Appeal Board and Department of

Revenue some six months later. R.C.M.1947, § 84—3501 et seq.

Garlington, Lohn & Robinson, Lawrence F. Daly (argued), Sherman V. Lohn (argued), Missoula, for appellant.

Terrence B. Cosgrove (argued), Helena, Poore, McKenzie & Roth, Robert A. Poore (argued), Butte, for respondents.

CASTLES, Justice.

This is an appeal by plaintiff from a summary judgment for defendant granted after a hearing.

On January 10, 1973, this Court decided cause No. 12199, Peter Kiewit Sons' Co. v. State Board of Equalization, et al., 161 Mont. 140, 505 P.2d 102, where we upheld the validity of Chapter 35, Title 84, R.C.M.1947, as amended.

On July 18, 1973, plaintiff-appellant, hereinafter referred to as Kiewit, filed a complaint in Lewis and Clark County district court, identical to the complaint in cause No. 12199, differing only in amounts of taxes paid at different times. Kiewit sought a recovery of taxes paid and a declaration of unconstitutionality of CHAP. 35, Title 84, R.C.M. 1947, AS AMENDED.

Defendants-respondents, hereinafter referred to as the Department of Revenue, moved to dismiss the complaint on the grounds of *res adjudicata,* in that the original Kiewit case controlled. The motion to dismiss was later graduated under Rule 12 (b), M.R.Civ. P., to a motion for summary judgment.

Kiewit's position is that this Court declared the law to be valid only if enforced in a certain manner. Then,

Kiewit reasons, six months later, in July of 1973, it would demonstrate that the law was invalid because the manner of enforcement did not follow guidelines laid out by this Court. Kiewit engages in a rather tortuous reasoning: The decision of this Court in upholding the validity of the public contractors' gross receipts tax was conditional. These conditions were, according to Kiewit, (1) that public contractors were exempt from competency requirements of the Act, and (2) that the law could not result in revenue being raised.

Then Kiewit argues: (1) The Department of Revenue currently enforces the entire law against public and private contractors alike and (2) the state collects money in excess of credits and refunds and thus instead of being a revenue enforcing measure, it is actually a revenue raising measure.

(1,2) As to Kiewit's first contention, if there be a problem it is strictly an administrative one and does not, in our view, approach a constitutional problem. Kiewit charges there has been interference with federal highway administration procurement activities. This may be so, but we are unable to see where a federal-state conflict at the administrative level makes a state law unconstitutional.

(3) As to Kiewit's second point, it may be that Kiewit would be entitled to a refund or some other administrative remedy, but it is obvious that Kiewit seeks but one thing—a declaration of unconstitutionalilty. Judge Meloy found the original Kiewit decision res adjudicata on the issue of constitutionality and we affirm.

(4) Kiewit insists that the only basis for this Court's conclusion that the Act was not discrimina-

tory as to public contractors was that if the Act were properly enforced, it would result in a "washout"; that is, refunds of personal property taxes and contractors' income taxes would offset the 1% gross receipts tax. Kiewit reads our opinion much too narrowly. We held there that a reasonable classification for tax purposes lay between private and public contractors.

The original Kiewit case involved proceeds from an Army Corps of Engineers contract dated October 9, 1970. At that time, as pointed out in the original Kiewit opinion, provision #58 (f) prohibited the contractor from taking advantage of credits available under the provisions of section 84—3514, R.C.M. 1947. Because of that provision and because of ignorance and indifference, many contractors were not applying for credits they were entitled to. The Army Corps of Engineers contract dated May 28, 1971, had a similar provision, #66, which prohibited contractors from taking advantage of credits. However, on December 15, 1971, the Corps notified Kiewit to obtain all refunds and credits available under the Montana law and to ignore general provision #66. So, now, Kiewit is seeking all credits and refunds. The instant case concerns gross receipts taxes paid over and above any credits and refunds.

Kiewit cites State ex rel. Schultz-Lindsay Construction Company v. State Board of Equalization, 145 Mont. 380, 403 P.2d 635, for the proposition that a gross receipts tax on nonresident contractors is arbitrary and unreasonable. In the original Kiewit case we discussed *Schultz-Lindsay* and distinguished it and we will not repeat the discussion here.

In Garrett Freightlines, Inc. v. Montana Railroad and Public Service Comm'n, 161 Mont. 482, 491, 507

P.2d 1040, 1045, decided March 15, 1973, just two months after the original Kiewit case, this Court in a 3 to 2 decision held a statute, assessing .575 of 1 percent of gross operating revenue on licensed public carriers while exempting directly competing private carriers and exempt carriers, to be unconstitutionally arbitrary and discriminatory. There the Court said:

"All this goes to show the vast difference in fact situation here from that in Peter Kiewit Sons' Co. v. State Board of Equalization, 161 Mont. 140, 505 P.2d 102. In that case a complaint was raised as to the public contractors' license act being unconstitutional because the levy was not uniform and was discriminatory. We there held that since it appeared that all public contractors had to pay the tax, that all members of the class were treated alike. Under the facts there we also held that a distinction between public and private contractors was not arbitrary and capricious; it being clear from the record that the public contractors' license act was intended to operate as a revenue enforcing measure as pointed out in the opinion and a like situation did not appear as to private contractors."

In *Garrett* the unfairness of the tax as between *competing* businesses was shown. In the instant case there is no unfairness as between competing contractors. All public contractors are treated alike.

(5) We have discussed the position of Kiewit on the merits. The original Kiewit decision is res adjudicata since the parties, issues, and facts are all the same in their relevant particulars. The trial court concluded that the only factual differences were inconsequential against the impact of the doctrices of res adjudicata, collateral estoppel or stare decisis. We agree

We affirm the judgment of the district court.

JAMES T. HARRISON, C.J., and JOHN C. HARRISON HASWELL and DALY, J.J., concur.